

1993

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, D.C.

-----:
In Re: : Docket No.
: 15-CRB-0001-WR
Determination of Royalty : (2016-2020)
Rates and Terms for :
Ephemeral Recording and :
Digital Performance of :
Sound Recordings (Web IV) :
-----:

RESTRICTED MATERIAL REDACTED
PURSUANT TO PROTECTIVE ORDER

DAY 8

Washington, D.C.

Wednesday, May 6, 2015

The hearing in the above-entitled
matter was convened at 9:16 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE

DAVID R. STRICKLER, JUDGE

JESSE FEDER, JUDGE

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1994	1996
<p>1 APPEARANCES</p> <p>2</p> <p>3 On behalf of SoundExchange:</p> <p>4 Munger Tolles & Olson, LLP</p> <p>5 GLENN POMERANTZ, ESQUIRE</p> <p>6 355 South Grand Avenue, 3rd Floor</p> <p>7 Los Angeles, California 90071</p> <p>8 213-683-9100</p> <p>9 - AND -</p> <p>10 JONATHAN H. BLAVIN, ESQUIRE</p> <p>11 560 Mission Street</p> <p>12 27th Floor</p> <p>13 San Francisco, California 94105</p> <p>14 415-512-4000</p> <p>15 On behalf of GEO Music:</p> <p>16 George Johnson Music Publishing</p> <p>17 GEORGE JOHNSON</p> <p>18 23 Music Square East, Suite 204</p> <p>19 Nashville, Tennessee 37203</p> <p>20 615-242-9999</p> <p>21 On behalf of Pandora Media, Inc.:</p> <p>22 Weil Gotshal & Manges, LLP</p> <p>23 BRUCE RICH, ESQUIRE</p> <p>24 BENJAMIN E. MARKS, ESQUIRE</p> <p>25 TODD LARSON, ESQUIRE</p> <p>DAVID YOLKUT, ESQUIRE</p> <p>767 Fifth Avenue</p> <p>New York, New York 10153</p> <p>212-310-8000</p> <p>- AND -</p> <p>Akin Gump Strauss Hauer & Feld, LLP</p> <p>JACOB B. EBIN, ESQUIRE</p> <p>2001 Market Street, Suite 4100</p> <p>Philadelphia, Pennsylvania 19103</p> <p>215-965-1200</p>	<p>1 ATTENDANCE, Continued</p> <p>2 On behalf of Educational Media Foundation:</p> <p>3 Wilkinson Barker Knauer, LLP</p> <p>4 DAVID D. OXENFORD, ESQUIRE</p> <p>5 2300 N Street, N.W.</p> <p>6 Suite 700</p> <p>7 Washington, D.C. 20037</p> <p>8 202-783-4141</p> <p>9 ALSO PRESENT:</p> <p>10 Colin Rushing</p> <p>11 Carl Shapiro</p> <p>12 Mounarde Mehanat, Esquire</p> <p>13 Michele E. Eddy, Capital Reporting Company</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
1995	1997
<p>1 ATTENDANCE, Continued</p> <p>2 On behalf of National Association of</p> <p>3 Broadcasters:</p> <p>4 Wiley Rein, LLP</p> <p>5 BRUCE G. JOSEPH, ESQUIRE</p> <p>6 JILLIAN VOLKMAR, ESQUIRE</p> <p>7 WESLEY E. WEEKS, ESQUIRE</p> <p>8 1776 K Street, N.W.</p> <p>9 Washington, D.C. 20006</p> <p>10 202-719-7000</p> <p>11 On behalf of iHeartMedia, Inc.</p> <p>12 Kellogg, Huber, Hansen, Todd,</p> <p>13 Evans & Figel, PLLC</p> <p>14 MARK C. HANSEN, ESQUIRE</p> <p>15 JOHN THORNE, ESQUIRE</p> <p>16 CAITLIN S. HALL, ESQUIRE</p> <p>17 LESLIE V. POPE, ESQUIRE</p> <p>18 1615 M Street, N.W.</p> <p>19 Suite 400</p> <p>20 Washington, D.C. 20036</p> <p>21 202-326-7900</p> <p>22 On behalf of SiriusXM Radio.</p> <p>23 Arent Fox, LLP</p> <p>24 MARTIN CUNNIFF, ESQUIRE</p> <p>25 1717 K Street, Northwest</p> <p>Washington, D.C. 20006</p> <p>202-857-6000</p> <p>On behalf of Intercollegiate Broadcasting and</p> <p>Harvard Radio:</p> <p>WILLIAM MALONE, ESQUIRE</p> <p>40 Cobbler's Green</p> <p>205 Main Street</p> <p>New Canaan, Connecticut 06840</p> <p>203-966-4770</p>	<p>1 EXAMINATION INDEX</p> <p>2</p> <p>3 WITNESS DIR CROSS REDIR REC</p> <p>4 DANIEL L. RUBINFELD, PH.D.</p> <p>5 BY MR. RICH 2000</p> <p>6 BY MR. JOSEPH 2020</p> <p>7 BY MR. HANSEN 2101</p> <p>8 BY MR. CUNNIFF 2222</p> <p>9</p> <p>10 RESTRICTED SESSION - Pages 2060-2082</p> <p>11 - Pages 2165-2246</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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1998	2000
<p>1 EXHIBIT INDEX</p> <p>2</p> <p>3 EXHIBITS ADMITTED INTO EVIDENCE</p> <p>4 PAGE</p> <p>5 SoundExchange</p> <p>6 Exhibit 3292 2203</p> <p>7</p> <p>8 NAB</p> <p>9 Exhibit 4215 2078</p> <p>10 Exhibit 4216 2078</p> <p>11 Exhibit 4217 2078</p> <p>12 Exhibit 4218 2078</p> <p>13 Exhibit 4219 2078</p> <p>14 Exhibit 4220 2078</p> <p>15 Exhibit 4221 2078</p> <p>16 Exhibit 4222 2078</p> <p>17 Exhibit 4223 2078</p> <p>18 Exhibit 4224 2078</p> <p>19 Exhibit 4225 2078</p> <p>20 Exhibit 4226 2078</p> <p>21 Exhibit 4227 2078</p> <p>22 Exhibit 4228 2078</p> <p>23 Exhibit 4233 2034</p> <p>24</p> <p>25</p>	<p>1 PROCEEDINGS</p> <p>2 (PUBLIC SESSION)</p> <p>3 CHIEF JUDGE BARNETT: Good morning.</p> <p>4 Thank you for your patience. Please be seated.</p> <p>5 We cannot make up the lost 15 minutes</p> <p>6 today because it's Wednesday. But tomorrow we can</p> <p>7 go until 4:30 so we recapture some of the lost</p> <p>8 time, unless that interferes with someone's</p> <p>9 obligations outside this room which you don't have</p> <p>10 any of, right?</p> <p>11 MR. RICH: Unfortunately.</p> <p>12 CHIEF JUDGE BARNETT: Mr. Rich.</p> <p>13 MR. RICH: Thank you. Good morning,</p> <p>14 Your Honors.</p> <p>15 ---</p> <p>16 DANIEL L. RUBINFELD, PH.D.,</p> <p>17 having been previously duly sworn, testified as</p> <p>18 follows:</p> <p>19 CONTINUED CROSS-EXAMINATION BY COUNSEL</p> <p>20 FOR PANDORA MEDIA</p> <p>21 BY MR. RICH:</p> <p>22 Q Good morning, Professor Rubinfeld.</p> <p>23 A Good morning.</p> <p>24 Q You acknowledge in your direct testimony</p> <p>25 that the CRB has, in prior determinations,</p>
1999	2001
<p>1 EXHIBIT INDEX CONTINUED</p> <p>2</p> <p>3 EXHIBITS ADMITTED INTO EVIDENCE</p> <p>4 PAGE</p> <p>5 IHM</p> <p>6 Exhibit 3409 2061</p> <p>7 Exhibit 3476 2047</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 including in the Web III Remand, questioned the</p> <p>2 use of agreements with interactive services as</p> <p>3 benchmarks for statutory webcasting services,</p> <p>4 correct?</p> <p>5 A It certainly questioned them. Depending</p> <p>6 on which version you're talking about, they</p> <p>7 sometimes thought it was in the zone of</p> <p>8 reasonableness, but they still were questioning</p> <p>9 how it should be applied.</p> <p>10 Q Yes. And, nevertheless, you continue to</p> <p>11 offer those same interactive service agreements as</p> <p>12 benchmarks in this proceeding as the best</p> <p>13 available evidence for rates to be set here,</p> <p>14 correct?</p> <p>15 A I'm putting forward the interactive</p> <p>16 agreements. They're not the identical agreements</p> <p>17 because time has gone by, but the same category.</p> <p>18 Q The same category.</p> <p>19 A Yes.</p> <p>20 Q And you do so, in your words from</p> <p>21 paragraph 21 of your -- by the way, the witness</p> <p>22 should have back his binder, please, of --</p> <p>23 A I have nothing.</p> <p>24 Q Sorry.</p> <p>25 CHIEF JUDGE BARNETT: The clerk has</p>

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2002	2004
<p>1 them.</p> <p>2 MR. POMERANTZ: Your Honor, while we're</p> <p>3 waiting, I just wanted to clarify whether we are</p> <p>4 going, on May 29th, with the hearing. I think all</p> <p>5 of us were counting on that we were going on that</p> <p>6 date, but one of your earlier orders said</p> <p>7 May 28th, and we just wanted to clarify.</p> <p>8 CHIEF JUDGE BARNETT: I all assumed we</p> <p>9 were going on the 29th until I somehow let a typo</p> <p>10 slip through or something. We're planning on</p> <p>11 going through the 29th.</p> <p>12 MR. POMERANTZ: Thank you.</p> <p>13 THE WITNESS: Okay. I have my written</p> <p>14 testimony.</p> <p>15 BY MR. RICH:</p> <p>16 Q The rationale you provide for continuing</p> <p>17 to use this category of agreements is because "The</p> <p>18 difference in rights between interactive and</p> <p>19 noninteractive services are less profound than in</p> <p>20 prior proceedings because there has been a</p> <p>21 substantial convergence in functionality and the</p> <p>22 ways in which consumers engage with noninteractive</p> <p>23 and interactive services."</p> <p>24 That's your testimony, correct?</p> <p>25 A Sounds like it. Which paragraph?</p>	<p>1 focusing on our client, Pandora, what, if any,</p> <p>2 changes undertaken by Pandora in recent years do</p> <p>3 you have in mind?</p> <p>4 A I had in mind some changes in offerings</p> <p>5 by Pandora that in some ways made it more -- I</p> <p>6 thought, more competitive or closer to some of the</p> <p>7 interactive services. So in paragraph 61, I</p> <p>8 pointed out, as an example, that Pandora added</p> <p>9 recommended stations last year. There are a</p> <p>10 couple other changes or innovations, if you will,</p> <p>11 that Pandora has made over time to, I think,</p> <p>12 broaden the appeal of the service. I don't</p> <p>13 remember all of them by memory.</p> <p>14 Q Sitting here today, other than the</p> <p>15 reference in -- to Pandora appearing in</p> <p>16 paragraph 61, is there any other change in</p> <p>17 Pandora's functionality, over the period of time</p> <p>18 you studied and report this convergence, that come</p> <p>19 to mind?</p> <p>20 A Well, I don't recall timing of some of</p> <p>21 Pandora's innovations, but I'm not sure that -- I</p> <p>22 believe there is one point at which Pandora</p> <p>23 allowed or made it easier to seed, S-E-E-D,</p> <p>24 stations with particular artists. I'm not sure</p> <p>25 that was always a part of their functionality.</p>
2003	2005
<p>1 Q Paragraph 21.</p> <p>2 A That's correct.</p> <p>3 Q As a result, you conclude, in the same</p> <p>4 paragraph, "Consumers are likely to view"</p> <p>5 on-demand services and noninteractive radio</p> <p>6 services "as relatively close substitutes for each</p> <p>7 other," correct?</p> <p>8 A Yes.</p> <p>9 Q First off, when you state that the</p> <p>10 "difference in rights" between interactive</p> <p>11 services and noninteractive services are less</p> <p>12 profound now than in the past, are you meaning to</p> <p>13 suggest the scope of copyright rights conferred</p> <p>14 upon these respective categories of services has</p> <p>15 changed as a legal matter?</p> <p>16 A No, I'm not.</p> <p>17 Q So you do recognize that the scope of</p> <p>18 copyright rights conveyed to interactive services</p> <p>19 remains considerably broader than those conveyed</p> <p>20 by law to statutory services, correct?</p> <p>21 A I'm not a legal expert, but that sounds</p> <p>22 right to me.</p> <p>23 Q When you insert that there's been a</p> <p>24 substantial convergence in functionality as</p> <p>25 between noninteractive and interactive services,</p>	<p>1 Q And such information as you've derived</p> <p>2 as to changes in Pandora's functionality come from</p> <p>3 Internet sources?</p> <p>4 A That would come from a combination of</p> <p>5 looking at Pandora's website, reading some of the</p> <p>6 standard commentary sources on the Internet, and</p> <p>7 looking at documents that were provided in this</p> <p>8 case.</p> <p>9 Q So just to round out this testimony,</p> <p>10 again, from -- apart from the -- Pandora's adding</p> <p>11 recommended stations in 2014 and the</p> <p>12 time-uncertain modifications you testified to one</p> <p>13 answer ago, can you think of any other changes in</p> <p>14 Pandora's functionality that has contributed to</p> <p>15 the reported convergence between interactive and</p> <p>16 noninteractive services that you believe has been</p> <p>17 taking place?</p> <p>18 A This is not something I've memorized so</p> <p>19 I would have to refer you, and I am referring</p> <p>20 myself back to my report. Anything I was aware</p> <p>21 of, I would have included in my report. So if I</p> <p>22 were -- to have a complete listing, I would have</p> <p>23 to take more time to look through my report. As</p> <p>24 we speak, there's -- hang on just one second --</p> <p>25 there's nothing else I can think of right away.</p>

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2006	2008
<p>1 Just give me one more second.</p> <p>2 Well, again, I'm not sure of the timing,</p> <p>3 but Pandora came out with its Premieres -- Pandora</p> <p>4 Premieres service, which was, I think, over a year</p> <p>5 or two ago. So that would have been certainly</p> <p>6 broadening out the set of offerings that Pandora</p> <p>7 has.</p> <p>8 And I don't know -- no, that's going</p> <p>9 back further in time. I was trying to think about</p> <p>10 when Pandora One was introduced, but that goes</p> <p>11 back much further in time so that probably was not</p> <p>12 what you had in mind.</p> <p>13 Q And the --</p> <p>14 A I'm not sure --</p> <p>15 Q Sorry.</p> <p>16 A I'm not sure exactly how broad the scope</p> <p>17 of your timing of your question is. Pandora has</p> <p>18 been around for quite a while, and they've made a</p> <p>19 lot of changes and innovations.</p> <p>20 Q You understand Pandora Premieres is not</p> <p>21 a noninteractive service, correct? It's not a</p> <p>22 statutory licensed service; is that correct?</p> <p>23 A That's correct.</p> <p>24 Q I think you said the most profound</p> <p>25 changes have occurred since 2009; is that correct?</p>	<p>1 have formed that are summarized in paragraphs 21</p> <p>2 and then in paragraphs 34 through 74 of your</p> <p>3 written direct testimony are based on the sources</p> <p>4 cited accompanying that testimony, correct?</p> <p>5 A Whenever possible, I tried to cite</p> <p>6 certainly primary sources for the opinions I had.</p> <p>7 I wouldn't necessarily say that I would have</p> <p>8 covered all the sources, but I tried to cover the</p> <p>9 ones that I thought were most prominent.</p> <p>10 So, for example, some information, I</p> <p>11 might have gotten from just reading -- reading the</p> <p>12 press that covers this space, and I may not have</p> <p>13 cited all of the articles I've read.</p> <p>14 Q But it was your -- you recognized it to</p> <p>15 be good practice, and, more importantly, it was</p> <p>16 your general practice to place citations wherever</p> <p>17 possible to support your factual assertions,</p> <p>18 correct?</p> <p>19 A That is correct.</p> <p>20 Q So the materials you cite to support</p> <p>21 your assertion that interactive and noninteractive</p> <p>22 services are close substitutes are essentially</p> <p>23 trade press articles, a few of what you identified</p> <p>24 in your deposition as scholarly articles, and one</p> <p>25 marketing study; is that correct?</p>
2007	2009
<p>1 That's in your testimony, right?</p> <p>2 A In my report?</p> <p>3 Q Yes.</p> <p>4 A It's quite possible I said that. I</p> <p>5 don't remember whether I said exactly that. Do</p> <p>6 you have a cite?</p> <p>7 Q Sir, it's your report. Since --</p> <p>8 A I can't remember. I can't memorize</p> <p>9 everything in my report.</p> <p>10 Q Okay. It either is there or it isn't.</p> <p>11 Since 2009, can you identify any other</p> <p>12 significant changes in Pandora functionality on</p> <p>13 its noninteractive statutory service than those</p> <p>14 you have identified?</p> <p>15 A Well, as I said, I don't -- as we speak,</p> <p>16 I can't think of any other changes by memory, but</p> <p>17 I would refer you back to my report. To think of</p> <p>18 others, I would have to take the time to read my</p> <p>19 report. If you want me to do so, I would be happy</p> <p>20 to, but I didn't want to take up too much time.</p> <p>21 Q We'll take your word for it that</p> <p>22 whatever you identified is contained in your</p> <p>23 report, yes?</p> <p>24 A That would be fine.</p> <p>25 Q Now, the opinions on convergence you</p>	<p>1 A Are you sure you have the categories</p> <p>2 correct? I don't have a count of how many cites</p> <p>3 are of each type, but those would be the</p> <p>4 categories of citations that I have, yes.</p> <p>5 Q And the one marketing study reference</p> <p>6 was done by Edison Research; is that correct?</p> <p>7 Paragraph 73, note 54.</p> <p>8 A That is clearly a marketing study. I'm</p> <p>9 just checking to see whether there are any others.</p> <p>10 That's the only one I see.</p> <p>11 Q The remainder of the documents you point</p> <p>12 to in support to your convergence claims are</p> <p>13 materials that you or your staff found during some</p> <p>14 Internet research; is that correct?</p> <p>15 A Yes, I think that is correct.</p> <p>16 Q These sources include Billboard, note</p> <p>17 24; theverge.com, note 26; macworld, note 25;</p> <p>18 allaccess.com, note 27; and geek.com, note 29;</p> <p>19 among others?</p> <p>20 A You're a little quick for me, but I</p> <p>21 think you cited those cites correctly. Those are</p> <p>22 just some examples of some of the websites I went</p> <p>23 to.</p> <p>24 Q What is theverge.com?</p> <p>25 A I'm not sure I'm familiar. Can you</p>

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2010	2012
<p>1 repeat?</p> <p>2 Q What is theverge.com, one of the sources</p> <p>3 you cite?</p> <p>4 A Which footnote is that?</p> <p>5 Q I believe it's note 29 -- pardon me.</p> <p>6 It's note 26.</p> <p>7 A I don't recall The Verge.</p> <p>8 Q Now, please turn to paragraph 53 of your</p> <p>9 written direct testimony, the byline to which is</p> <p>10 "Functionality has become more similar over time."</p> <p>11 Do you see that?</p> <p>12 A Yes, I do see that.</p> <p>13 Q For purposes of my question, please</p> <p>14 focus on the last sentence of that paragraph which</p> <p>15 reads, "Indeed, some industry observers have found</p> <p>16 that Pandora's substantial degree of customization</p> <p>17 and personalization can come close to replicating</p> <p>18 the lean-forward experience of Spotify's on-demand</p> <p>19 service in a lean-back way through customized but</p> <p>20 ostensibly DMCA-compliant webcasting." Do you see</p> <p>21 that?</p> <p>22 A Yes.</p> <p>23 Q You say "some industry observers,"</p> <p>24 correct?</p> <p>25 A Yes.</p>	<p>1 Pandora, when you're going through and, for</p> <p>2 example, giving a thumbs up or a thumbs down to</p> <p>3 various songs that you're hearing, you are being</p> <p>4 active in the process. And if you are -- and,</p> <p>5 also, you're being active when you decide which</p> <p>6 songs to skip and which songs not to skip.</p> <p>7 So I think as you become more and more</p> <p>8 active, what was lean-back, listening to a radio</p> <p>9 station without really trying to, sort of,</p> <p>10 affect -- describe your preferences but affect the</p> <p>11 nature of the station as it evolves, as you become</p> <p>12 more active, it starts, for me, to look like it's</p> <p>13 lean-forward to some extent and not just</p> <p>14 lean-back.</p> <p>15 So, to sum up, I could go to Pandora and</p> <p>16 listen to some Pandora-curated stations and really</p> <p>17 do nothing and I might be quite happy, or I could</p> <p>18 decide to become more active and try to take</p> <p>19 advantage of Pandora's algorithm and let the</p> <p>20 stations evolve to be closer to my preferences.</p> <p>21 In doing that, to me, means you're leaning forward</p> <p>22 to some extent.</p> <p>23 Q So your comparison here in terms of</p> <p>24 saying "coming close to replicating" is measuring</p> <p>25 the degree of actual physical activity or</p>
2011	2013
<p>1 Q If you look at the supporting footnote,</p> <p>2 which is footnote 24, am I correct that you cite a</p> <p>3 single source for that proposition?</p> <p>4 A You are correct. I just want to add,</p> <p>5 just to make it clear, in analyzing the</p> <p>6 convergence issue, I did rely to some extent on my</p> <p>7 own experience and the experience of my staff. So</p> <p>8 I actually, as mentioned earlier, spent some time</p> <p>9 with a variety of these websites and tried to look</p> <p>10 at the different functionality that they offered,</p> <p>11 so -- to confirm what I've read and a lot of press</p> <p>12 that we talked about earlier.</p> <p>13 Q Am I correct, though, that --</p> <p>14 A You are correct, this only cites one</p> <p>15 source.</p> <p>16 Q One source, singular?</p> <p>17 A Yes.</p> <p>18 Q What exactly do you mean by the</p> <p>19 statement that "Some observers have found that</p> <p>20 Pandora's substantial degree of customization and</p> <p>21 personalization can come close to replicating the</p> <p>22 lean-forward experience of Spotify's on-demand</p> <p>23 services in a lean-back way"? What exactly are</p> <p>24 you communicating there?</p> <p>25 A Well, when you're going through -- with</p>	<p>1 interaction in terms of either literally sitting</p> <p>2 back or actuating thumbs up or thumbs down, is it</p> <p>3 measuring the degree of user interface, or did you</p> <p>4 mean to imply that the actual ability to select</p> <p>5 particular songs for listening is close to</p> <p>6 replicating the Spotify experience?</p> <p>7 A I didn't mean -- your question sounds</p> <p>8 compound to me. I didn't -- I was never claiming</p> <p>9 that the services were identical. There are</p> <p>10 differences, clearly, between Spotify and Pandora.</p> <p>11 So I was suggesting just convergence, convergence</p> <p>12 meaning that if I'm very active in telling Pandora</p> <p>13 what I like and don't like, the nature of the</p> <p>14 station can evolve in ways that can become more</p> <p>15 similar to what I might do on Spotify if I were</p> <p>16 curating my own station. It can't be identical</p> <p>17 because there are obviously important differences</p> <p>18 between the two, but they can move closer together</p> <p>19 as I become more active with Pandora.</p> <p>20 Q What are the important differences?</p> <p>21 A Well, on the Pandora side, Pandora is a</p> <p>22 statutory service so it has to follow the</p> <p>23 requirements to be DMCA-compliant, and Spotify</p> <p>24 does not have to do that. So Spotify can</p> <p>25 literally pick out -- if I want to take the time,</p>

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2014	2016
<p>1 I can curate a station that has all the artists 2 and songs I want. and I can't do that -- I can't 3 do that on Pandora, and, of course, on Pandora, if 4 I do choose an artist to seed a station, I'm going 5 to be limited as to the number of songs I hear by 6 that artist. 7 Q In that sense, the experience of 8 listening to Pandora doesn't come close to 9 replicating the experience of listening to music 10 on Spotify. You would agree, right? 11 A No, I don't agree with that. I said I 12 think it can come close to it. I think if you 13 work at it, the experience can be quite similar, 14 but you really have to work at it. You have to 15 lean forward and become very active with the 16 choices you're making. 17 Q When you reference the ostensibly 18 DMCA-compliant webcasting, referring here to 19 Pandora, what do you have in mind by "ostensibly 20 compliant"? 21 A My recollection is I just put in that 22 word because there are -- I understood that there 23 are some legal, technical issues about exactly 24 what it takes to be DMCA compliant or not, so I 25 was just being cautious in my language. For</p>	<p>1 that? 2 A Yes. 3 Q Is that based on the same testimony you 4 gave just a few minutes ago? 5 A Yes, it's essentially the same. 6 Q Do you understand that a Pandora user 7 can select the songs she wants to hear when she 8 wants to hear them? 9 A No. 10 Q Do you understand she can do that on 11 Spotify Premium? 12 A Yes, I do understand there are 13 differences of the kind you're describing. 14 Q Do you understand that a Pandora user 15 can listen to an entire album of her entire 16 artist? 17 A No. 18 Q Do you understand that a Spotify Premium 19 user can do so? 20 A Yes. 21 Q Do you understand that a Pandora user 22 could create a playlist of favorite songs and 23 listen to them at any time and in the order of her 24 choosing? 25 A No, she cannot do that.</p>
2015	2017
<p>1 example, you might authorize -- you might allow 2 people to have many skips. And I wasn't sure, if 3 you allow, say, six skips an hour, whether that 4 would raise compliance issues or not. 5 I wasn't sure. So I was just using that 6 word to, sort of, leave myself some coverage 7 because I don't claim to have any technical, legal 8 understanding of exactly where the line is between 9 being DMC compliant or not. 10 Q Did you mean to raise a question before 11 these judges as to whether Pandora is, in fact, 12 statutorily compliant? 13 A I've assumed Pandora is statutorily 14 compliant. 15 Q Turn to page 160 of your testimony. 16 A I'm there. 17 Q Second sentence, "Noninteractive but 18 customized 'lean-back' services such as Pandora 19 can effectively replicate the listening experience 20 that a listener would 'lean forward' to choose on 21 Spotify." Do you see that? 22 A Yes. 23 Q So here you don't even say "close to 24 replicating." Here you say "can effectively 25 replicate the listening experience." Do you see</p>	<p>1 Q Do you understand a subscriber to 2 Spotify Premium can do so? 3 A Yes. 4 Q Can a Pandora user skip without 5 limitation? 6 A No. 7 Q Rewind? 8 A No. 9 Q Do you believe Spotify Premium 10 subscribers can do so? 11 A I'm not sure about rewind. 12 Q Are you familiar with something called a 13 sound recording complement? 14 A Yes. 15 Q Is Pandora, to your knowledge, subject 16 to the limitations of the sound recording 17 complement when it programs music for its users? 18 A Yes. 19 Q Do you have an understanding whether 20 Spotify Premium is subject to those limitations in 21 its ability to fulfill user demand for music? 22 A My understanding is that it is not 23 subject to that limitation. 24 Q Notwithstanding that, Pandora users "can 25 effectively replicate the listening experience"</p>

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2018	2020
<p>1 she would enjoy on Spotify; is that correct?</p> <p>2 A That's my statement, and my statement is</p> <p>3 based on the fact that one can -- as I suggested</p> <p>4 in the earlier testimony, that one -- if one works</p> <p>5 at it and leans forward, one can come close to the</p> <p>6 same experience. I didn't mean that you had all</p> <p>7 of the same functionalities. You clearly don't.</p> <p>8 I never meant to imply that.</p> <p>9 Q Now, finally, I believe you did respond</p> <p>10 in a fashion to the next two questions when asked</p> <p>11 them at a different setting yesterday by Judge</p> <p>12 Strickler, but you did not do any quantitative</p> <p>13 analysis of your own to ascertain whether, in</p> <p>14 fact, interactive and noninteractive services are</p> <p>15 close substitutes, did you?</p> <p>16 A Depends on what you mean by</p> <p>17 "quantitative." If you mean did I do, say,</p> <p>18 regression analysis --</p> <p>19 Q Yes.</p> <p>20 A -- no, I didn't.</p> <p>21 Q And you've done no analysis to ascertain</p> <p>22 whether and to what degree consumers substitute</p> <p>23 between on-demand services and noninteractive</p> <p>24 radio services in reaction to price, have you?</p> <p>25 A Again, I haven't done a statistical</p>	<p>1 MR. JOSEPH: Thank you (handing).</p> <p>2 CROSS-EXAMINATION BY COUNSEL FOR NATIONAL</p> <p>3 ASSOCIATION OF BROADCASTERS</p> <p>4 BY MR. JOSEPH:</p> <p>5 Q Good morning, Dr. Rubinfeld.</p> <p>6 A Good morning.</p> <p>7 Q As you know, I'm Bruce Joseph. I'm here</p> <p>8 representing the National Association of</p> <p>9 Broadcasters.</p> <p>10 A I do.</p> <p>11 Q May I ask you, please, to turn to</p> <p>12 paragraph 149 of your written direct testimony,</p> <p>13 which I believe is behind tab I of your direct</p> <p>14 examination binder.</p> <p>15 A I have it.</p> <p>16 Q You see there that you wrote, and I</p> <p>17 quote, "Because they bridge programs, terrestrial</p> <p>18 radio and webcasting, simulcasters occupy a unique</p> <p>19 position in the marketplace"?</p> <p>20 A Yes.</p> <p>21 Q And in making that statement, you</p> <p>22 particularly wanted to distinguish simulcasting</p> <p>23 from Pandora and more customized services,</p> <p>24 correct?</p> <p>25 A Yes.</p>
2019	2021
<p>1 analysis. There have been other experts who have</p> <p>2 done such analysis. There was a survey done by</p> <p>3 Ms. Butler, and there's substitution information</p> <p>4 implicit in the contract study, but I personally</p> <p>5 have not done a statistical study.</p> <p>6 Q Yes, and Ms. Butler had not even</p> <p>7 performed her study at the time that you submitted</p> <p>8 your direct testimony; isn't that the case?</p> <p>9 A That's correct.</p> <p>10 MR. RICH: I have no further questions.</p> <p>11 Thank you.</p> <p>12 CHIEF JUDGE BARNETT: Mr. Joseph.</p> <p>13 MR. JOSEPH: Thank you, Your Honor.</p> <p>14 With apologies to the trees we actually</p> <p>15 have a second cross-examination binder, and I</p> <p>16 actually would appreciate it if the direct</p> <p>17 examination binder that includes Dr. Rubinfeld's</p> <p>18 written testimony could also be placed in front of</p> <p>19 him.</p> <p>20 CHIEF JUDGE BARNETT: Sure.</p> <p>21 MR. JOSEPH: I don't expect to refer to</p> <p>22 the first cross-examination binder so it would be</p> <p>23 your direct and the second.</p> <p>24 May I approach the witness, Your Honor?</p> <p>25 CHIEF JUDGE BARNETT: You may.</p>	<p>1 Q You would agree, would you not, that</p> <p>2 there is substantial differentiation among</p> <p>3 noninteractive services?</p> <p>4 A Yes, I would.</p> <p>5 Q And indeed, it's true, is it not, that</p> <p>6 you still think of simulcasting as being quite</p> <p>7 different than on-demand streaming?</p> <p>8 A I do, yes.</p> <p>9 Q Now, the interactivity adjustment that</p> <p>10 you presented in your written direct testimony did</p> <p>11 not specifically address simulcasting, did it?</p> <p>12 And I say specifically address simulcasting.</p> <p>13 A I think that's correct, yes.</p> <p>14 Q And you performed the adjustment by</p> <p>15 comparing subscription prices for interactive and</p> <p>16 noninteractive services, correct?</p> <p>17 A Yes.</p> <p>18 Q And your comparison of subscription</p> <p>19 prices did not include any subscription prices</p> <p>20 specifically for simulcasting, did it?</p> <p>21 A That's correct.</p> <p>22 Q And in paragraph 209 of your written</p> <p>23 direct testimony, which, I don't know that you</p> <p>24 need to refer to it. Let me ask you the question.</p> <p>25 You can tell me whether you need -- you're free to</p>

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2022	2024
<p>1 do it, but you also point to Dr. McFadden's study 2 in support of your interactivity adjustment, 3 correct? 4 A I do. 5 Q Dr. McFadden's study did not offer 6 respondents the choice of listening to a radio 7 simulcast. did it? 8 A It did not. 9 Q Now. let's discuss your interactivity 10 adjustment a little bit more. Please turn to 11 paragraph 168 of your written direct testimony. 12 In that paragraph -- let me know when 13 you're there. 14 A I'm there. 15 Q In that paragraph, in the last sentence, 16 you say, "I have used the ratio of the market 17 prices of the interactive and noninteractive 18 subscription services as an appropriate 19 interactivity adjustment." Do you see that? 20 A I do. 21 Q Now, in paragraph 169, the next 22 paragraph, you say that there are two assumptions 23 implicit in that approach. Do you see that? 24 A Yes. 25 Q The first assumption that you say is</p>	<p>1 Q I'm sorry, Dr. Rubinfeld, is that in 2 your written direct testimony anywhere? 3 A There's a specific exhibit I was 4 referring to. I assume it's in either my direct 5 or my rebuttal testimony. 6 Q But that's a significant distinction. 7 Is it in your written direct testimony anywhere? 8 A I sometimes do not remember what's in my 9 direct and what's in my rebuttal so it may have 10 been in my rebuttal testimony if that's what 11 you're suggesting. I can check. It will just 12 take a minute. 13 Q Please do. 14 A I believe it was in the -- that was in 15 the rebuttal testimony. 16 Q So let me ask my question again. 17 A Sure. 18 Q Yes or no, does your written direct 19 testimony present any economic basis in support of 20 the implicit assumption that the ratio of the 21 average retail subscription price to the 22 per-subscriber royalty paid by the licensee to the 23 record label is approximately the same in both 24 interactive and noninteractive markets? 25 A I can't give you citations off the top</p>
2023	2025
<p>1 implicit is that "The ratio of the average retail 2 subscription price to the per-subscriber royalty 3 paid by the licensee to the record labels is 4 approximately the same in both the interactive and 5 noninteractive markets." Is that an implicit 6 assumption you've identified? 7 A Yes. 8 Q Does your written direct testimony 9 anywhere present an economic basis for that 10 implicit assumption? 11 A Well, I had a discussion yesterday -- 12 Q I'm sorry, Dr. Rubinfeld, I'm asking, in 13 your written direct testimony, can you point to -- 14 A Oh. Well, sure, I can -- 15 Q -- an economic basis for that implicit 16 assumption? 17 A I was actually getting to the citation 18 indirectly. I was just going to say I had a 19 discussion yesterday about a figure, I can't 20 remember the exact number, which showed that when 21 you went across a wide range of interactive 22 services, that the percentage of revenue was the 23 same. So that suggests, for interactive services, 24 that there's a relationship within interactive 25 services.</p>	<p>1 of my head, but what I would be looking for if I 2 go back through my report would be a discussion of 3 the relationship between bargaining upstream over 4 royalties and how that's related to downstream 5 competition. We've had some discussion yesterday 6 during my testimony during some of my 7 cross-examination about that relationship. It's 8 the relationship between the downstream demand and 9 competition and how that affects the upstream 10 royalties. That is the core of the question 11 you're asking me. 12 So there are points -- I'm pretty sure 13 there are points in this report where I talk about 14 that issue. I don't have any formal economic 15 analysis. I did not write down exact formulas 16 that would show you how to relate the two. That's 17 why I described it as an assumption. But I do, at 18 various points in my reports, talk about 19 downstream competition and upstream competition as 20 well. That's the key to this sentence. 21 Q But you just presented that as an 22 assumption but no analysis, correct, in your 23 testimony? 24 A It's an assumption because I have no 25 quantitative analysis that I was able to do that</p>

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2026	<p>1 was able to prove or to find empirically exactly 2 what that relationship was. So I was putting it 3 out front as saying that is an important 4 assumption. I think the assumption has some 5 foundation, but I was not able to do the type of 6 empirical work I would have liked to do to 7 actually nail that point down. 8 Q And that assumption is actually 9 foundational to your entire analysis, isn't it? 10 A As I said, it's an important assumption, 11 yes. 12 Q Let me ask you to take a look at 13 footnote 124, paragraph 207, which is appended -- 14 footnote to paragraph 207 in your written direct 15 testimony. 16 A You said footnote 124? 17 Q 124, correct. 18 A I have it. 19 Q In the last sentence there, you refer to 20 something Dr. Pelcovits did in Web II and Web III, 21 where he used the ratio of the average market 22 prices, correct? Do you see that? 23 A Yes. 24 Q You say that you were -- in that 25 footnote you said that in doing the same thing,</p>	2028	<p>1 what he did, correct? 2 A Somewhat critical is a fair 3 characterization. 4 Q In fact, you admitted at your deposition 5 on December 11 that you were "not relying on 6 Dr. Pelcovits at all," didn't you? 7 A I don't recall that, but it certainly 8 sounds like something I might have said. 9 Q Let me ask you to turn, in your 10 cross-examination binder, to page 193 of the -- 11 the white binder, please, sir. The first tab, I 12 believe, is your December 11th deposition. 13 Take a look, please, on page 49 of the 14 document, which includes deposition page 193. 15 A I have it. 16 Q Toward the bottom, is it true you said. 17 "I'll help you out by telling you one more thing. 18 So I agree that, well, I'm not relying on 19 Dr. Pelcovits at all"? Do you see that? 20 A Yes, I do see that. 21 Q That was a true statement when you made 22 it, correct? 23 A Yes, sir. 24 Q Do you recall that in his February 27th 25 written rebuttal testimony, Professor Katz</p>
2027	<p>1 you were "following past practices"? 2 A Yes. I was referring to using the ratio 3 of the subscription prices when I made that 4 statement. 5 Q Now, you reviewed Dr. Pelcovits' 6 testimony in Web II and Web III, didn't you? 7 A Yes. 8 Q It's true, is it not, that you do not 9 agree with everything that Dr. Pelcovits did in 10 his analysis related to his interactivity 11 adjustment? 12 A Yes. there were parts of his analysis 13 that I did not agree with. 14 Q And you believe he made some assumptions 15 in the underlying demand structure that you did 16 not think were valid, correct? 17 A That's correct. 18 Q And if you were to asked to criticize 19 Dr. Pelcovits, you would be somewhat critical of 20 what he did, wouldn't you? 21 A Somewhat. There are a lot of aspects of 22 the approach he used that I thought were well done 23 and excellent, but there were other aspects that I 24 disagreed with. 25 Q And you would be somewhat critical of</p>	2029	<p>1 criticized the lack of an economic basis for your 2 assumption that the ratio of average retail 3 subscription price to per-subscriber royalty paid 4 by the licensee is approximately the same for both 5 interactive and noninteractive services? 6 A I believe he did make that criticism. 7 yes. 8 Q So you remember then that on April 13th 9 at your deposition -- on your rebuttal deposition, 10 I asked you what caused you to believe that the 11 record companies would receive the same percentage 12 of subscription price in the interactive and 13 noninteractive markets. Do you remember that? 14 A Vaguely, I would say. But I'm sure 15 you'll be able to remind me. 16 Q Sure. Why don't we remind you both what 17 I asked and what you said. 18 (Video played as follows:) 19 BY MR. JOSEPH: 20 Q Actually, my question is explicitly what 21 causes you to believe that the record companies 22 would receive the same percentage of subscription 23 price in the two markets when they license to the 24 two markets? 25 A I -- if I said the same percentage, I</p>

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2030	2032
<p>1 don't think I meant to say they would necessarily 2 receive the same percentage. I just was 3 suggesting a thought that there are deals that 4 have a percentage of revenue component to them. 5 That's all I was saying. 6 Q So you're not saying that you would 7 expect the percentage of revenue paid to the 8 record companies in the two markets to be the 9 same? 10 A No, I'm not saying that. 11 (Video stopped.) 12 MR. POMERANTZ: Your Honor, may I 13 object. I don't believe they have the right to 14 play a video without at least letting me know what 15 testimony they're going to play so that I know 16 whether it's complete -- it looked like there was 17 some editing there. And I would ask that, if 18 they're ever going to show video, that I be 19 informed in advance what it is to make sure it's 20 complete. When I'm looking at the transcript, I 21 can tell, but with the video I can't. 22 CHIEF JUDGE BARNETT: Understood. 23 Counsel, if you're anticipating showing 24 video of a deposition for which we have a 25 transcript, start with a page reference, please.</p>	<p>1 MR. JOSEPH: It went from 613, line 14, 2 through 614, line 7. 3 MR. POMERANTZ: Thank you. 4 MR. JOSEPH: May I approach, Your Honor? 5 CHIEF JUDGE BARNETT: Yes. Thank you. 6 MR. JOSEPH: May I approach the witness. 7 Your Honor? 8 CHIEF JUDGE BARNETT: You may. 9 MR. JOSEPH: (handing) 10 BY MR. JOSEPH: 11 Q Dr. Rubinfeld, the video clip and the 12 transcript entry, the transcript at page 613, 13 line 14, to 614, line 7. accurately reflect the 14 testimony you gave on April 13th, don't they? 15 A Yes. 16 Q Now, it is true, did you not, that 17 subsequently, on April 22nd, you revised that 18 testimony in your errata sheet for the deposition. 19 correct? 20 A Yes. I would say I clarified it. I 21 thought that there was confusion between what you 22 were asking and what I was answering originally 23 when I read the deposition. and so added this 24 clarification. 25 MR. JOSEPH: I think, since the errata</p>
2031	2033
<p>1 MR. JOSEPH: I apologize for that, Your 2 Honor. 3 CHIEF JUDGE BARNETT: The opposing 4 party, whomever that might be, will have an 5 opportunity to ask for a fuller reading of the 6 transcript. So let's start with this one. What 7 page of the transcript will we find that on? 8 MR. JOSEPH: Page 613, Your Honor. And 9 I was actually going to continue to point out that 10 there was an errata or a correction to that 11 testimony that was served, and I was actually 12 going to make that available as well. 13 CHIEF JUDGE BARNETT: Okay, go ahead. 14 613 of what date? 15 MR. JOSEPH: Of April 13th, Your Honor. 16 CHIEF JUDGE BARNETT: April 13th. 17 MR. JOSEPH: Yes. The pages are 18 actually consecutively numbered. 19 MR. POMERANTZ: Right. And, Your Honor, 20 at least the way I saw the video, it looked like 21 it skipped, and I just want to understand what 22 lines -- there wasn't any skip in there? 23 MR. JOSEPH: There was no skip, sir. It 24 started on line 14. 25 MR. POMERANTZ: Line 14 through --</p>	<p>1 is difficult to fit into the transcript, we 2 actually prepared a demonstrative. if I may, that 3 would show the comparison between the original 4 answer and the revised answer? 5 CHIEF JUDGE BARNETT: Did you want to 6 have this marked? 7 MR. JOSEPH: I think it probably does 8 make -- well, I wasn't planning to offer the -- 9 well, actually, the video is in the record. I'm 10 trying to figure out how to best clarify this and 11 get it in. 12 CHIEF JUDGE BARNETT: Go ahead with what 13 you were planning. and let's see where that puts 14 us. 15 Q Now, Dr. Rubinfeld, I handed you a 16 demonstrative that reflects the revisions you made 17 to your testimony to, what you described, to 18 clarify. Do you see the demonstrative? 19 A Yes. 20 Q Does that accurately reflect both your 21 original testimony and your revision to that 22 testimony? 23 A Yes, it does. 24 MR. JOSEPH: Your Honor, we would offer 25 that. I don't -- I need the next -- I need the</p>

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<p style="text-align: right;">2034</p> <p>1 exhibit number for impeachment purposes only. It 2 was not previously marked, but we obviously aren't 3 obligated to mark a page from the exhibits. 4 MR. POMERANTZ: Which exhibit are you 5 offering? 6 MR. JOSEPH: The demonstrative which 7 includes the answer and the response. 8 MR. POMERANTZ: I would object, Your 9 Honor. This isn't evidence. I don't mind them 10 offering the errata so Your Honor can have the 11 errata, but I don't think this is evidence. This 12 is a demonstrative. 13 CHIEF JUDGE BARNETT: Well, I think it's 14 discretionary whether we admit demonstratives, and 15 I, for one, find it easier to read this one so 16 we'll give it a number, and we will admit it, 17 hearing no other objection. 18 (NAB Exhibit 4233 was admitted 19 into evidence.) 20 BY MR. JOSEPH: 21 Q Now, Professor Rubinfeld, let's discuss 22 the substitution effects of interactive and 23 noninteractive markets. In preparing your written 24 direct testimony -- again, I'm talking about your 25 written direct testimony -- you did not study the</p>	<p style="text-align: right;">2036</p> <p>1 CHIEF JUDGE BARNETT: Big page 55 or 2 transcript page 55? 3 MR. POMERANTZ: I'm sorry. transcript 4 page 55, big page 15. 5 A Yes, I did say that. 6 Q And, in fact, you said you haven't 7 studied the relative impact of possible 8 substitution activities in the two frameworks. 9 interactive and noninteractive. didn't you? 10 A Yes. 11 Q Let me ask you -- do we still have the 12 demonstratives that Mr. Pomerantz used yesterday. 13 It looks like we don't. We do? Thank you. 14 That's fine, I'll use Exhibit 5, which 15 is in the testimony. 16 Dr. Rubinfeld, please turn to Exhibit 5 17 to your written direct testimony, which is behind 18 tab 6 of your direct examination binder. That was 19 also -- if anyone still has the binder and finds 20 it easier, slide 21 of Mr. Pomerantz's 21 demonstratives from yesterday. 22 Exhibit 5. Dr. Rubinfeld, lists the 23 subscription prices you use in your calculation of 24 your interactivity adjustment based on 25 subscription prices, correct?</p>
<p style="text-align: right;">2035</p> <p>1 relative substitutional impact on music 2 purchases -- let me start over. 3 In preparing your written direct 4 testimony, you did not study the relative 5 substitutional impact on music purchases of 6 interactive versus noninteractive services, did 7 you? 8 A Depends what you mean by "study" and 9 exactly what you mean by "substitution." If by 10 "study," you mean, again, did I do an empirical 11 econometric-type study, no. But the issue of 12 substitution is something I thought about from the 13 beginning when I was doing work on this case. So 14 maybe you can clarify how specific your question 15 is. 16 Q I'll take the no empirical analytical 17 work to quantify whether there were differences in 18 substitution. Would that be a fair statement? 19 A Yes, I did not do anything statistical 20 that would measure differences in substitution. 21 Q It is true, is it not, that you 22 testified in your testimony you were "agnostic" 23 about the relative substitution impact of the two? 24 And I'm referring there to page 55 of your 25 April 13th deposition.</p>	<p style="text-align: right;">2037</p> <p>1 A Yes. 2 Q Now, you chose the services to include 3 in the table; is that right? 4 A Yes. 5 Q Now, on the top part you intended to 6 include the interactive services. correct? 7 A Yes. 8 Q And on the bottom you intended to 9 include services that are entitled to the 10 statutory license. correct? 11 A Well, they're -- I intended to include 12 noninteractive services. I'm not sure whether all 13 of them would have been fully subject to the 14 statutory license. 15 Q That was your intent in creating the 16 table, wasn't it? 17 JUDGE STRICKLER: What does the "that" 18 in your sentence mean? 19 MR. JOSEPH: Using statutory -- services 20 that were entitled to the statutory license in the 21 noninteractive part of the table. 22 A With respect to the -- I just have a 23 puzzle that I'm unclear about in my mind. With 24 respect to -- I was definitely interested in 25 looking at noninteractive services because I</p>

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<p style="text-align: right;">2038</p> <p>1 wanted to understand the price of services that 2 had noninteractive functionality. That was my 3 emphasis. 4 I don't recall whether I was thinking or 5 checking whether every one of these services would 6 actually be subject to the statute. 7 Q Do you remember on December 11th, in 8 your first deposition, where I asked you whether, 9 when you used the expression "noninteractive" in 10 your report, that you were referring to services 11 that were entitled to the statutory license? 12 A It's quite possible I would have had 13 that discussion with you. I don't remember it 14 specifically, but it sounds quite likely because 15 that's generally the way I think about it. I was 16 just hesitating here because there are some -- 17 there may be some services that one would think of 18 as noninteractive but would not necessarily -- 19 without some adjustment, wouldn't necessarily be 20 covered by the statute. They may offer some 21 functionality that would make it not covered fully 22 by the statute. 23 Q Thank you, Dr. Rubinfeld. You're 24 actually anticipating where I'm going, but let's 25 talk about what you intended when you created this</p>	<p style="text-align: right;">2040</p> <p>1 A I haven't found that yet. You're a 2 little too quick for me. Would you just please 3 repeat the page cite. 4 Q Yes, page 138, line 24. 5 A I see it now, thank you. You did read 6 that correctly. 7 Q And that testimony was true when you 8 gave it, sir? 9 A Yes. 10 Q Let me ask you to turn to paragraph 207 11 of your written direct testimony. 12 A I'm there. 13 Q Do you see the first sentence? You say, 14 and I quote, "Exhibit 5 details the market price 15 of both interactive and statutory paid 16 subscription services." Do you see that? 17 A I'm sorry, Mr. Joseph, I'm not at the 18 same place. Where am I supposed to be? 19 Q Paragraph 207 of your written direct 20 testimony -- 21 A Oh. 22 Q -- where you discuss your interactivity 23 adjustment. 24 A I thought you were in the deposition. 25 Sorry.</p>
<p style="text-align: right;">2039</p> <p>1 table. If you turn to page 106 of your 2 December 13th deposition, it's big page 28, 3 transcript page 106. 4 A Can you start again and tell me where 5 I'm going? 6 Q Yes. Page 106 of your transcript. 7 A Okay. 8 Q Do you see there where you said, "My 9 plan in using the terms were to use the phrase 10 'noninteractive services' to describe services 11 that are eligible for the statutory license," and 12 I said, again, "That was your intent?" And you 13 said, "Yes." Do you see that? 14 A I do see that, yes. 15 Q And then with respect to the specific 16 table, if you would turn, please, to transcript 17 page 138 of the same deposition. 18 A I have it. 19 Q Look at the bottom in line 24, where I 20 said, "And by noninteractive, now we're referring 21 specifically to this table, this is consistent 22 with our prior discussion of your intent that 23 these are services that are entitled to the 24 statutory license?" And you said "Yes." Do you 25 see that?</p>	<p style="text-align: right;">2041</p> <p>1 Q Sorry if I wasn't clear. 2 A I'm there now. 3 Q And the first sentence says, "Exhibit 5 4 details the market price of both interactive and 5 statutory paid subscription services." 6 Do you see that? 7 A Yes. 8 Q So when you wrote your written direct 9 testimony, you intended that exhibit to include, 10 in the bottom part of the table, statutory 11 subscription services, correct? 12 A That's certainly what I said. As I 13 suggested earlier, at some point, and it may have 14 been after -- it may have been either earlier and 15 I did not clarify, or it may have been after, I 16 began to think harder about the fact that some of 17 the services would not be fully available for the 18 statute unless there's some modifications, so -- 19 but, you're right, at the time I wrote this, that 20 was presumably not something that was in front of 21 me. So I was focusing on ones that were -- that I 22 believe would be -- would be statutory services. 23 Q Let me ask you, sir, to turn, if I can 24 find it, to Exhibit 18 in your written rebuttal 25 testimony, which you referenced yesterday with</p>

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<p style="text-align: right;">2042</p> <p>1 Mr. Pomerantz, which is behind tab 51 of your -- 2 let me hold that because I'm getting ahead of 3 myself. Let me withdraw that. 4 Let's go back to Exhibit 5. 5 Do you see there that you identify 6 Rhapsody unRadio as a noninteractive, meaning 7 statutory service? Do you see that? 8 A Yes. 9 Q You would agree, would you not, that 10 Rhapsody unRadio is not entitled to the statutory 11 license, correct? 12 A I would agree. It does have some 13 functionality, which would go beyond what would be 14 appropriate for statutory service. 15 Q Indeed, it allows unlimited skips, 16 correct? 17 A Yes. 18 Q And it allows the caching and on-demand 19 playback of selected -- up to 25 selected songs, 20 correct? 21 A I don't remember the exact number, but 22 in my rebuttal report, I described some of the 23 differences. So are you citing from my report, so 24 we can check? 25 Q I'm asking for your knowledge of the</p>	<p style="text-align: right;">2044</p> <p>1 probably correct. 2 Q Let me ask you to turn to your written 3 rebuttal testimony on page 47, note 156. Your 4 written rebuttal testimony is behind tab 31 of 5 your direct examination binder. 6 A I'm at the testimony. What paragraph or 7 what page? 8 Q I'm looking for page 47, footnote 156. 9 Are you there? 10 A No, I just -- now I'm there, yes. 11 Q Do you see it refers to the 12 university -- Universal Rhapsody term sheet dated 13 April 18th, 2014? 14 CHIEF JUDGE BARNETT: Is this restricted 15 material? 16 MR. POMERANTZ: We're okay with just 17 that reference. I'm not sure where he goes with 18 it. If he goes into the terms of it, we'll have 19 to close it. 20 CHIEF JUDGE BARNETT: I was just going 21 to say, I don't think naming it is restricted, but 22 go ahead. 23 MR. JOSEPH: I apologize, Your Honor. I 24 actually didn't think naming it would be viewed as 25 restricted either, but I should be --</p>
<p style="text-align: right;">2043</p> <p>1 service, which you have relied upon in multiple 2 parts of both your direct and rebuttal testimony, 3 sir. 4 A Well, off the top of my head, I agree 5 with the qualitative description you gave. I just 6 don't remember exactly the number that you cited. 7 You cited 25. I don't recall by memory that 8 number. I would have to go back and check. 9 Q But you'll recall that the service does 10 allow the caching and on-demand playback of a 11 certain number of what are identified as favorite 12 songs, correct? 13 A Correct. With respect to caching and 14 playback of songs, I don't recall the specific 15 language, but I have no reason to disagree with 16 your characterization. 17 Q Rhapsody unRadio allows the caching of 18 stations for offline playback as well, doesn't it? 19 A I believe it does, yes. 20 Q And Rhapsody unRadio is allowed to show 21 the upcoming track that will be played, correct? 22 A I don't know that off the top of my 23 head, but I have no reason to disagree with what 24 you said. I would have to go back and check, but 25 I have no reason to disagree with that. That's</p>	<p style="text-align: right;">2045</p> <p>1 MR. POMERANTZ: And I think because the 2 terms that are set forth in paragraph 197 are 3 restricted. I think we're okay where we are right 4 now. 5 CHIEF JUDGE BARNETT: Okay. 6 MR. JOSEPH: I wasn't planning on 7 discussing those terms. I was actually planning 8 to discuss the provisions regarding the 9 functionality of the service. And I should check 10 with Mr. Pomerantz to see if he has any objection 11 to a discussion of that document with respect to 12 the terms regarding the allowed functionality of 13 the service. 14 MR. POMERANTZ: Your Honor, because I 15 don't have my -- Universal is not here, I think I 16 need to protect their rights. I just don't know 17 whether they treat it as confidential or not so I 18 think I would have to request the confidentiality. 19 CHIEF JUDGE BARNETT: That information 20 is in paragraph 196, which is not marked as 21 restricted. 22 MR. POMERANTZ: I think as long as it's 23 within 196, I have no objection to that. 24 CHIEF JUDGE BARNETT: Thank you. 25 MR. JOSEPH: Although, Your Honor, to be</p>

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<p style="text-align: right;">2046</p> <p>1 fair to Mr. Pomerantz, I was actually going to see 2 if I could refresh the witness' recollections with 3 respect to the other nonstatutory functions that 4 may apply to the service. 5 CHIEF JUDGE BARNETT: Well, the services 6 are available for sale in the market, correct? 7 The functionality is -- has to be public knowledge 8 if they intend to sell the service. 9 MR. POMERANTZ: Certainly. I have no 10 objection to him referring to the publicly 11 available features of it, just not the contract 12 itself. 13 CHIEF JUDGE BARNETT: Certainly. Thank 14 you. 15 Go ahead, Mr. Joseph. 16 BY MR. JOSEPH: 17 Q Dr. Rubinfeld, let me ask you to turn 18 to, in your cross-examination binder, to an 19 exhibit marked iHeartMedia 3476, which is also a 20 document that was identified in your deposition as 21 Deposition Exhibit 11. 22 A I have it. 23 Q Is this the document you reviewed and 24 cited in your footnote 156? 25 A Yes, I believe it is.</p>	<p style="text-align: right;">2048</p> <p>1 Radio Plus, which is another entry in your 2 statutory noninteractive list of subscription 3 prices. Slacker Radio Plus is not entitled to a 4 statutory license, is it? 5 A I don't believe so. 6 Q In fact, it allows for unlimited skips 7 and caching for offline playback, correct? 8 A I don't remember all of the 9 functionality of each of these services off the 10 top of my head. So that sounds right. If you 11 could refer me to -- if I can go back to the 12 document, I can double-check, but I have no reason 13 to disagree with your characterization. 14 Q Did you look at Slacker's website to 15 determine the functionality of the service? 16 A Yes, I have looked at their website. 17 Q Let me see if we can refresh your 18 recollection as to the functionality of Slacker 19 Radio Plus. 20 MR. JOSEPH: May I approach, Your Honor? 21 CHIEF JUDGE BARNETT: You may. 22 MR. JOSEPH: Would you like me to keep 23 asking or ... 24 CHIEF JUDGE BARNETT: To approach the 25 witness?</p>
<p style="text-align: right;">2047</p> <p>1 MR. JOSEPH: Your Honor, I offer iHeart 2 3476 rather than clearing the courtroom to 3 identify the terms that may or may not be relevant 4 to the examination I was planning. 5 CHIEF JUDGE BARNETT: Thank you. 6 Hearing no objection, 3476 is admitted. 7 (IHM Exhibit 3476 was admitted 8 into evidence.) 9 BY MR. JOSEPH: 10 Q Dr. Rubinfeld, I think you already have 11 agreed that Rhapsody unRadio includes a number of 12 features that are not eligible -- that a service 13 that is using the statutory license can't offer; 14 is that correct? 15 A That is correct. 16 Q So it's reasonable to assume, is it not, 17 that the subscription price reflected in your 18 Exhibit 5 includes at least some payment for extra 19 statutory functionality? 20 A Yes, I think if I were to view this as a 21 primary source of developing a numerical 22 benchmark, I would want to adjust the subscription 23 price to account for the functionality that went 24 beyond the statutory license. 25 Q Now, let me ask you to look at Slacker</p>	<p style="text-align: right;">2049</p> <p>1 MR. JOSEPH: Yes. 2 CHIEF JUDGE BARNETT: That's really 3 isn't necessary when there's no jury. I'm not 4 anticipating any violent witnesses. 5 MR. JOSEPH: I'm not claiming any, Your 6 Honor. 7 THE WITNESS: I was going to say, you're 8 a fearsome opponent, Mr. Joseph, but I think I'll 9 be okay. 10 BY MR. JOSEPH: 11 Q I just handed you a document that I can 12 represent to you I printed from Slacker's website. 13 Does it refresh your recollection concerning the 14 functionality of Slacker's Radio Plus offering? 15 A Yes. I think you referred to unlimited 16 skips and caching? 17 Q Yes, sir. 18 A Yes, it does refresh my memory. 19 Q And the statutory license, as I think 20 we've already discussed, does not permit unlimited 21 skips or caching for offline playback, does it? 22 A It does not. 23 Q So it would be fair to say, would it 24 not, that the subscription price for Slacker Radio 25 Plus reflected in Exhibit 5 includes payment for</p>

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<p style="text-align: right;">2050</p> <p>1 extra statutory functionality?</p> <p>2 A It would depend on the value of that</p> <p>3 functionality, but it's certainly possible, yes.</p> <p>4 Q Well, as an economist, you would expect</p> <p>5 that consumers are paying something for that</p> <p>6 functionality, correct?</p> <p>7 A Yes, I would say that functionality is</p> <p>8 part of what goes into the price, that's right.</p> <p>9 Q And, in fact, Professor McFadden's</p> <p>10 conjoint study, on which you also rely, gives a</p> <p>11 value to unlimited skips and caching for offline</p> <p>12 playback in each of those functions, doesn't it?</p> <p>13 A It does.</p> <p>14 Q Do you remember, off the top of your</p> <p>15 head, what value Professor McFadden's study gave</p> <p>16 to those functions?</p> <p>17 A No, I don't.</p> <p>18 Q Let's talk about MixRadio Plus, which is</p> <p>19 also in your list of noninteractive statutory</p> <p>20 services that you used for your primary</p> <p>21 interactivity adjustment. I'm looking at</p> <p>22 Exhibit 5.</p> <p>23 A Okay, go ahead.</p> <p>24 Q Now, MixRadio Plus is not entitled to</p> <p>25 the statutory license, is it?</p>	<p style="text-align: right;">2052</p> <p>1 services. Do you see that?</p> <p>2 A Yes.</p> <p>3 Q You identify a \$4-per-month subscription</p> <p>4 price for that service. Do you see that?</p> <p>5 A Yes.</p> <p>6 Q And, in fact, the Musicoverly</p> <p>7 subscription price is now 99 cents per month when</p> <p>8 billed on an annual basis; is that correct?</p> <p>9 A I would have to accept your word for it.</p> <p>10 I don't know. That's not something I can confirm</p> <p>11 off the top of my head.</p> <p>12 Q Understandable. May I suggest that you</p> <p>13 look at your Exhibit 18 to your written rebuttal</p> <p>14 testimony, which is tab 51 of your direct</p> <p>15 examination binder.</p> <p>16 A Yes, now I can confirm it. Thank you.</p> <p>17 Q And Exhibit 18 in your rebuttal</p> <p>18 testimony, I think you described earlier as an</p> <p>19 updated comparison of subscription service</p> <p>20 pricing?</p> <p>21 A Yes.</p> <p>22 Q It's true, is it not, that Exhibit 18</p> <p>23 still includes, under the noninteractive or</p> <p>24 statutory service list, MixRadio Plus, Slacker</p> <p>25 Radio Plus, and Rhapsody unRadio?</p>
<p style="text-align: right;">2051</p> <p>1 A No, I don't believe it is.</p> <p>2 CHIEF JUDGE BARNETT: Let's take our</p> <p>3 morning recess, 15 minutes. We'll come back to</p> <p>4 this question.</p> <p>5 (A brief recess was taken.)</p> <p>6 CHIEF JUDGE BARNETT: Please be seated.</p> <p>7 Sorry for the delay. Mr. Joseph, go ahead.</p> <p>8 MR. JOSEPH: Thank you, Your Honor.</p> <p>9 BY MR. JOSEPH:</p> <p>10 Q I think before the break I was simply</p> <p>11 asking Dr. Rubinfeld whether MixRadio Plus was</p> <p>12 entitled to use the statutory language --</p> <p>13 statutory license.</p> <p>14 A And the answer is no, it has some</p> <p>15 features that would not make it eligible for the</p> <p>16 statutory license.</p> <p>17 Q And, for example, MixRadio Plus allows</p> <p>18 unlimited song skipping, correct?</p> <p>19 A Correct.</p> <p>20 Q And it allows caching of stations for</p> <p>21 offline playback, correct?</p> <p>22 A Correct.</p> <p>23 Q Now, again looking at Exhibit 5 of your</p> <p>24 written direct testimony, I see you have a service</p> <p>25 called Musicoverly in the noninteractive statutory</p>	<p style="text-align: right;">2053</p> <p>1 A Yes.</p> <p>2 Q Now, let me refer you to the</p> <p>3 demonstrative slide 24 from yesterday's direct</p> <p>4 examination, and I believe I need to give you the</p> <p>5 clerk's copy of the demonstrative binder. I'll be</p> <p>6 right over with that.</p> <p>7 Now, it's true, is it not, Professor</p> <p>8 Rubinfeld, that this slide describes a relatively</p> <p>9 high level of generality how you computed your</p> <p>10 adjustment ratio of 1.1 for plays per hour and</p> <p>11 your analysis of the interactive service</p> <p>12 benchmark?</p> <p>13 A Yes, that's correct.</p> <p>14 Q And you used two numbers to develop that</p> <p>15 ratio, correct? One was an estimate of</p> <p>16 royalty-bearing plays per hour on Pandora?</p> <p>17 A Yes.</p> <p>18 Q And the other was an estimate of</p> <p>19 revenue-bearing plays on a nonstatutory service,</p> <p>20 correct?</p> <p>21 A Yes.</p> <p>22 Q Could you just describe, at a general</p> <p>23 level, how you computed the estimated number of</p> <p>24 royalty-bearing plays per hour on a nonstatutory</p> <p>25 service? I'm not looking for details, just</p>

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<p style="text-align: right;">2054</p> <p>1 concept.</p> <p>2 A We went through -- my staff and I went</p> <p>3 through analysis of the number of skips on various</p> <p>4 services, and we also -- I have a separate sheet</p> <p>5 that does the calculation. We made an estimate of</p> <p>6 how long a typical lab was, how long a typical</p> <p>7 song was, basically went through an hour of play,</p> <p>8 doing all the adjustments for the various things</p> <p>9 that will take place during an hour to net out</p> <p>10 what would be the number of royalty-bearing plays.</p> <p>11 There is a separate sheet that I</p> <p>12 produced which went through the details of how we</p> <p>13 did that calculation. It's one of my exhibits.</p> <p>14 Q Did you actually look at the number of</p> <p>15 skips on any noninteractive service?</p> <p>16 A Do you mean did I look at statistics for</p> <p>17 skips for particular services or ...</p> <p>18 Q Statistics, counts, any source to tell</p> <p>19 you the actual number of skips on a noninteractive</p> <p>20 service.</p> <p>21 A Sorry. That's something -- that</p> <p>22 particular exercise, I think, was done. but it was</p> <p>23 done by my staff. I didn't personally look at all</p> <p>24 the services and try to do the count for skips</p> <p>25 myself, but I believe my staff did.</p>	<p style="text-align: right;">2056</p> <p>1 services?</p> <p>2 A Yes.</p> <p>3 Q Actually. I'm afraid this is probably a</p> <p>4 restricted question so let me see if there's a way</p> <p>5 to get to it without.</p> <p>6 Would you agree that Spotify -- well,</p> <p>7 I'll have to save this. Let me come back to it.</p> <p>8 I think we just established, in</p> <p>9 preparing your testimony you did not conduct any</p> <p>10 analysis of how many skips Spotify has on its --</p> <p>11 let me withdraw that.</p> <p>12 You did not actually obtain data to</p> <p>13 determine how many skips Spotify actually has on</p> <p>14 its interactive service, did you?</p> <p>15 A I did not.</p> <p>16 Q Let me talk for a minute about your</p> <p>17 recommended percentage of revenue play. Let me</p> <p>18 ask you to assume hypothetically that a</p> <p>19 simulcaster performs music for about half of its</p> <p>20 programming and has talk programming for the other</p> <p>21 half. It's not your opinion, is it, that the</p> <p>22 simulcaster should pay 55 percent of its total</p> <p>23 simulcast revenue under the revenue part of your</p> <p>24 fee formula?</p> <p>25 A That is not my opinion. I would presume</p>
<p style="text-align: right;">2055</p> <p>1 Q So you actually think your adjustment</p> <p>2 number reflects an analysis of actual skips on</p> <p>3 noninteractive services?</p> <p>4 A It's not based -- it's not a calculation</p> <p>5 based on tabulating skips on actual services, but</p> <p>6 I thought you were just asking whether we had</p> <p>7 looked at that. I believe we looked at it. The</p> <p>8 actual calculation is a hypothetical calculation.</p> <p>9 It's not tabulated by looking at actual skips.</p> <p>10 Q It was actually based on a number of</p> <p>11 assumptions, correct?</p> <p>12 A Yes.</p> <p>13 Q And those assumptions are detailed in</p> <p>14 Exhibit 15A of your written direct testimony.</p> <p>15 correct?</p> <p>16 A That sounds right, yes.</p> <p>17 Q Now, it's true, is it not, that many of</p> <p>18 the interactive services do not pay for any skips</p> <p>19 or short plays?</p> <p>20 A You said "skips or short plays"? Is</p> <p>21 that what you said?</p> <p>22 Q Yes, I did.</p> <p>23 A That's true.</p> <p>24 Q And you would agree, would you not, that</p> <p>25 Spotify is the largest of the interactive</p>	<p style="text-align: right;">2057</p> <p>1 that the percentage of revenue would be applied to</p> <p>2 only the music portion of the programming.</p> <p>3 Q And you have not put forward any expert</p> <p>4 testimony as to how one should actually determine</p> <p>5 that attribution or allocation, have you?</p> <p>6 A Beyond that broad concept, I have not</p> <p>7 put forward any specifics, that's correct.</p> <p>8 Q Now, Dr. Rubinfeld, in -- actually, I'm</p> <p>9 going to talk to you a little bit about your Apple</p> <p>10 benchmark if I might.</p> <p>11 In preparing your testimony about the</p> <p>12 iTunes Radio licenses, it's true, is it not, that</p> <p>13 you reviewed the iCloud and iMatch agreements</p> <p>14 between Apple and Sony and Warner?</p> <p>15 A Yes.</p> <p>16 Q In fact, you personally looked through</p> <p>17 all of the Sony and Warner and Apple cloud</p> <p>18 agreements, haven't you?</p> <p>19 A Yes.</p> <p>20 Q Let me ask you to look, in your</p> <p>21 cross-examination binder, at the document</p> <p>22 identified as iHeartMedia Exhibit 3409, which I</p> <p>23 think is toward the end of the binder, next to the</p> <p>24 last.</p> <p>25 A I have it, yes.</p>

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2058	2060
<p>1 Q Do you recognize this as a document that 2 you were shown as Exhibit 10 in your deposition on 3 April 14th? 4 A Yes. 5 Q Do you recognize that as an agreement 6 covering -- an agreement between -- let me 7 withdraw that. 8 Do you recognize this as an amendment to 9 the agreement between Apple and Sony relating to 10 the Apple cloud service? 11 A Yes, I do. 12 Q Do you recognize it to have been 13 executed on the same day as the Sony/Apple iTunes 14 Radio agreement? 15 A I believe it was, but I'm not -- I'm 16 looking for the confirmation. I don't see the 17 confirmation in this document. Am I missing 18 something, or am I -- my recollection was they 19 were on the same day, but I don't see that in the 20 document. 21 Q Turn to the second page of the exhibit. 22 Do you see the signature line with the date? 23 A I see it now, yes. Yes. June 5th, 2013. 24 I see it. 25 MR. JOSEPH: I think, Your Honor, we're</p>	<p>1 (THIS BEGINS RESTRICTED SESSION) 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
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<p>1 getting to where there will be an interspersing of 2 restricted and not restricted information so I 3 would ask that, just in the interest of safety, 4 that we close the courtroom. 5 CHIEF JUDGE BARNETT: If any of you are 6 here and have not signed the nondisclosure 7 certificate under the protective order, then I'll 8 ask that you please wait outside. 9 Mr. Joseph, do you think we will be in 10 closed session until the noon break? 11 MR. JOSEPH: Let me take a look here. 12 Your Honor. 13 No, Your Honor, I don't expect to be. 14 CHIEF JUDGE BARNETT: Thank you. 15 (THIS ENDS PUBLIC SESSION) 16 (RESTRICTED SESSION BOUND SEPARATELY) 17 18 19 20 21 22 23 24 25</p>	<p>1 (THIS PAGE CONTAINS RESTRICTED MATERIAL) 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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<p style="text-align: right;">2082</p> <p>1 (THIS PAGE CONTAINS RESTRICTED MATERIAL)</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">2084</p> <p>1 A I wasn't ranking them, if that's what</p> <p>2 you mean. I didn't have that exercise in my mind.</p> <p>3 Q Now, we've talked a fair amount about</p> <p>4 Rhapsody unRadio, and I won't burden the record</p> <p>5 repeating anything that we talked about, but</p> <p>6 recognizing that Rhapsody unRadio allowed</p> <p>7 unlimited skips, caching of stations, on-demand</p> <p>8 playback of certain songs, you didn't make any</p> <p>9 adjustments in the rate that you cite in your</p> <p>10 discussion of Rhapsody unRadio to account for the</p> <p>11 extra statutory functionality, did you?</p> <p>12 A No, I didn't, because I was just looking</p> <p>13 at this to generally corroborate any work. If I</p> <p>14 was going to actually use it to create a</p> <p>15 alternative suggested rate, I would have done some</p> <p>16 functionality adjustments.</p> <p>17 Q Now, in your part 3E of your written</p> <p>18 rebuttal testimony, which is behind tab 31 of your</p> <p>19 direct examination binder, you also discuss the</p> <p>20 Spotify free tier, correct?</p> <p>21 A Yes.</p> <p>22 Q That tier includes desktop, laptop, and</p> <p>23 tablet access that are fully on-demand, correct?</p> <p>24 A I would have to double-check that with</p> <p>25 respect to -- hang on just a second. I just don't</p>
<p style="text-align: right;">2083</p> <p>1 (THIS BEGINS PUBLIC SESSION)</p> <p>2 CHIEF JUDGE BARNETT: You can proceed,</p> <p>3 Mr. Joseph.</p> <p>4 MR. JOSEPH: Thank you, Your Honor.</p> <p>5 BY MR. JOSEPH:</p> <p>6 Q Professor Rubinfeld, in part 3E of your</p> <p>7 written rebuttal testimony, you discuss licensing</p> <p>8 agreements for four services that you describe as</p> <p>9 noninteractive and/or ad supported; is that</p> <p>10 correct?</p> <p>11 A Four in addition to Apple?</p> <p>12 Q Yes.</p> <p>13 A Yes, that's correct.</p> <p>14 Q You assert the licenses for those</p> <p>15 services corroborate the rates proposed by</p> <p>16 SoundExchange, correct?</p> <p>17 A Yes.</p> <p>18 Q Now, you're not offering those</p> <p>19 agreements as benchmarks in their own right, are</p> <p>20 you?</p> <p>21 A No, I view that as just corroborative.</p> <p>22 Q When you wrote your written rebuttal</p> <p>23 testimony, you didn't have the view that any of</p> <p>24 the four services was more probative than any of</p> <p>25 the others, did you?</p>	<p style="text-align: right;">2085</p> <p>1 recall whether all of those different devices were</p> <p>2 all fully on-demand.</p> <p>3 Q You would agree that desktop and laptop</p> <p>4 access are fully on-demand?</p> <p>5 A I believe that's correct.</p> <p>6 Q So your only question is tablet?</p> <p>7 A I was thinking about tablets, yes. If</p> <p>8 you give me a second, I'll try to locate that</p> <p>9 section of the report where it spells it out.</p> <p>10 Yes, it does include tablets, you're</p> <p>11 right.</p> <p>12 Q That's fully on-demand, right?</p> <p>13 A Yes. The mobile service is not, but the</p> <p>14 various versions you described are fully</p> <p>15 on-demand.</p> <p>16 Q And you didn't make any interactivity</p> <p>17 adjustment in the rates that you identify in</p> <p>18 paragraphs 193 and 194 of your written rebuttal</p> <p>19 testimony for interactivity. I'm not sure if I</p> <p>20 included the word "interactivity" already in the</p> <p>21 sentence or not so let me withdraw it and try it</p> <p>22 again.</p> <p>23 You didn't make any interactivity</p> <p>24 adjustment for the license fee rate paid by</p> <p>25 Spotify for the free tier you discuss in</p>

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2086	<p>1 paragraphs 193 and 194 of your rebuttal testimony,</p> <p>2 did you?</p> <p>3 A No, I did not. I viewed this as --</p> <p>4 previously as corroborative. If I had used it to</p> <p>5 actually produce an alternative calculation, I</p> <p>6 would have done an adjustment.</p> <p>7 Q Now, you mentioned the Spotify mobile</p> <p>8 service, but you would agree, would you not, that</p> <p>9 even the mobile access on the Spotify free tier</p> <p>10 exceeds the functionality allowed under the</p> <p>11 statutory license, correct?</p> <p>12 A I would agree to that.</p> <p>13 Q For example, the shuffle service allows</p> <p>14 you to specify a complete playlist as long as it's</p> <p>15 long enough. I think about an hour, that will be</p> <p>16 played back in a shuffled order, correct?</p> <p>17 A Yes.</p> <p>18 Q And it allows users to select an album</p> <p>19 and hear selections from that album played in a</p> <p>20 shuffled order, correct?</p> <p>21 A Correct.</p> <p>22 Q And it allows users to pick an artist</p> <p>23 and only hear songs from that artist played in the</p> <p>24 shuffled order, correct?</p> <p>25 A That is correct.</p>	2088
2087	<p>1 Q And you didn't make any adjustments in</p> <p>2 the rate you cite in your discussion of Spotify's</p> <p>3 free tier to account for those extra statutory</p> <p>4 functionalities of the mobile service, did you?</p> <p>5 A I did not, for the same reason I</p> <p>6 described previously. My goal here was not to do</p> <p>7 a separate calculation of a rate.</p> <p>8 Q It's reasonable to assume, is it not,</p> <p>9 that at least some of what Spotify was paying for</p> <p>10 was for functionality that exceeded the rights</p> <p>11 available under the statutory license?</p> <p>12 A Yes, that's reasonable.</p> <p>13 Q And the agreements between the record</p> <p>14 companies and Spotify related to the free tier</p> <p>15 were negotiated as part of broader agreements</p> <p>16 between Spotify and the record company, weren't</p> <p>17 they?</p> <p>18 A Yes, I believe that's true.</p> <p>19 Q And Spotify is entitled to -- let me</p> <p>20 withdraw that because it may get into restricted</p> <p>21 information.</p> <p>22 Let's talk about another one of the</p> <p>23 services you identify, Nokia MixRadio. Now, we're</p> <p>24 not talking about MixRadio Plus, which is the</p> <p>25 subscription service, but MixRadio -- MixRadio is</p>	2089
	<p>1 not DMCA compliant either, is it?</p> <p>2 A Yes, I missed -- you were a little too</p> <p>3 quick for me. I just missed your transition</p> <p>4 sentence. We're talking about Nokia MixRadio? Is</p> <p>5 that what you were saying?</p> <p>6 Q Yes, sir.</p> <p>7 A Yes. And it is not DMCA compliant, that</p> <p>8 is correct.</p> <p>9 Q Indeed, as you note in paragraph 199, it</p> <p>10 allows users to cache radio stations and play them</p> <p>11 offline, correct?</p> <p>12 A Yes. I described it as near DMCA</p> <p>13 compliant, but then I explained that it does allow</p> <p>14 caching, which would make it noncompliant.</p> <p>15 Q So it's your view that caching is near</p> <p>16 DMCA compliant?</p> <p>17 A No, I was -- caching, once you're</p> <p>18 caching, you're not DMCA compliant, that's clear</p> <p>19 to me. So I was just repeating part of the</p> <p>20 sentence that I had in my report. And that was a</p> <p>21 qualitative judgment on my part. It wasn't a</p> <p>22 judgment about whether caching can allow you to be</p> <p>23 compliant. It was just saying this is one</p> <p>24 difference. There could have been many other</p> <p>25 differences between what it would take to be</p>	
	<p>1 compliant and what it would take not to be</p> <p>2 compliant but it was not a debate about caching.</p> <p>3 Q Is it your view that a service that</p> <p>4 allows caching for offline playback is near DMCA</p> <p>5 compliant?</p> <p>6 A It's clearly not DMCA compliant in the</p> <p>7 technical sense. The question is -- in terms of</p> <p>8 thinking about the kinds of adjustments we're</p> <p>9 talking about for functionality, the question is</p> <p>10 how big a move is that in terms of value. That's</p> <p>11 what I was talking about in the sentence. I</p> <p>12 wasn't talking about the technical question of</p> <p>13 whether you're compliant or not.</p> <p>14 Q Let's discuss Beats limited free</p> <p>15 service, which I think you referred to as The</p> <p>16 Sentence, okay?</p> <p>17 A Yes.</p> <p>18 Q Now, actually, the function that's</p> <p>19 called The Sentence is a function of various Beats</p> <p>20 services, including its subscription on-demand</p> <p>21 service, isn't it?</p> <p>22 A That's correct. I'm talking about the</p> <p>23 free version of The Sentence.</p> <p>24 Q That was -- you were referring to the</p> <p>25 continuing availability of that feature for users</p>	

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<p style="text-align: right;">2090</p> <p>1 who had signed up for a trial of the Beats 2 subscription service but decided not to subscribe? 3 Is that what you were referring to? 4 A Well, yes, I am -- I am talking about 5 individuals who signed up for the free service and 6 they have not -- they have not subscribed, that is 7 correct. 8 Q At least as of the time you submitted 9 your written rebuttal testimony, The Sentence -- 10 free version of The Sentence feature was no longer 11 available on Beats, was it? 12 A Well, Beats, I'm not certain about, but 13 Beats The Sentence is still available. I've 14 looked at it recently, and, my recollection, I've 15 been to the site without paying a subscription. 16 So maybe -- so I think -- I guess I would have to 17 double-check. I'm not sure about that. 18 Q Did you actually use The Sentence 19 feature for free and receive full track play of 20 songs? 21 A No, I'm not sure I did. So I would have 22 to double-check that. 23 Q Actually, when you were asked about The 24 Sentence feature being available in your 25 deposition on April 14th, just a couple of weeks</p>	<p style="text-align: right;">2092</p> <p>1 A I didn't actually play any songs. One 2 of the things I've done -- actually, several 3 times -- is just go to various websites and look 4 at the features of the service. I don't think I 5 actually played a song. 6 Q Let me ask you to turn to your 7 Appendix 1 of your written rebuttal testimony, 8 which is SoundExchange Exhibit 127, and if you'll 9 look at page 001. It's in tab 32, I'm sorry, in 10 your written -- in the direct examination binder. 11 A Which number was that? 12 Q Tab 32, first page of the exhibit. 13 A Okay. 14 Q It's actually the first page of your 15 Appendix 1. 16 A I've got it. 17 Q Let's take a look at a sample month of 18 June 2014 for Sony, which is actually conveniently 19 on that first page. Do you see reference to a 20 variety of different Beats services and plans? 21 A Yes. 22 Q And the service you're referring to is 23 the one that's referred to as the limited free 24 service, correct? 25 A Yes.</p>
<p style="text-align: right;">2091</p> <p>1 ago, did you understand the service to still be 2 available? 3 A I was not sure. At the time I didn't 4 think it was available because, as we know, Beats 5 was acquired by Apple, and I thought at the time 6 that, as part of the acquisition, Apple had closed 7 down The Sentence, but then I actually went back 8 more recently and accessed them through the 9 website and found that they still were offering 10 the service. There still exists, to my knowledge, 11 a Beats The Sentence service that is available. I 12 can't tell you whether it's free or not, without 13 going back and checking it. 14 Q Is it your understanding that the 15 service, as I think you answered earlier, is a 16 feature that's also available on Beats' on-demand 17 service? 18 A Yes. 19 Q So you're just referring to seeing a 20 reference to The Sentence on Beats' website? 21 A It seemed to be like more than a 22 reference. When I went to the site, I thought -- 23 to go back, I did this just fairly recently, just 24 in the last several weeks. 25 Q Did you actually use the service?</p>	<p style="text-align: right;">2093</p> <p>1 Q Just while we're here, would it be fair 2 to say that the number of plays on the limited 3 free service was roughly between 1 percent and 4 2 percent of the total plays on Beats in any given 5 month? 6 A I can't do that calculation in my head. 7 It's clearly a modest number of plays compared to 8 Beats in total, but I can't tell you whether it's 9 1 percent. 10 Q Well, in preparing your written rebuttal 11 testimony, did you actually examine what portion 12 of the plays made by Beats were plays that were 13 part of the limited free service that you relied 14 upon in your testimony? 15 A I was aware that the number of plays was 16 modest, but I did not do any of the calculations 17 you're describing. 18 Q Well, as long as we have the 19 identification of the service you're talking about 20 in the record, we can do the calculations and not 21 burden the record time now. But what I wanted to 22 do was turn to the next page. You'll see in 23 October of 2014, there's a reference to the 24 limited free service, correct? 25 A Yes.</p>

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<p style="text-align: right;">2094</p> <p>1 Q And then in November of 2014, there is 2 no reference to the limited free service; is that 3 correct? 4 JUDGE STRICKLER: November of which 5 year? 6 MR. JOSEPH: 2014. Did I mislead you? 7 JUDGE STRICKLER: I thought you said 8 '13. Maybe I misheard you. 9 A You're correct that it's zero in -- 10 JUDGE STRICKLER: You're right. 11 A -- October and does not appear to exist 12 again in November. So that does suggest that the 13 limited free service was shut down, if that's what 14 you're suggesting, counsel. 15 Q It's your testimony, Dr. Rubinfeld. I 16 was just asking. 17 A I told you earlier, I have gone to see 18 that Beats The Sentence is still in existence, but 19 I did not actually -- I don't recall whether I was 20 looking at the free service or not. So it's quite 21 possible that they no longer offer the free 22 service. I would have to double-check that. 23 Q And it's true, is it not, that the Beats 24 limited free service is allowed to exceed the 25 limits imposed by the statutory license?</p>	<p style="text-align: right;">2096</p> <p>1 specific question that you have? 2 Q Do you have an understanding of whether 3 they do or they don't? 4 A I think it's quite possible, but if you 5 ask -- without going back and checking, which I 6 was going to do now, I can't tell you exactly what 7 the range of possibilities are for what Beats can 8 do. I just don't have a recollection. 9 Q But you didn't make any accommodation in 10 your analysis for the possibility or for any 11 differences between what Beats is able to do and 12 what the statutory license would allow, correct? 13 A I tried as best to describe the 14 differences, but I did not do any calculations 15 that would make an adjustment, that's correct. 16 Q Rather than close the courtroom again 17 because that would be a burden on anyone, I'll ask 18 Dr. Rubinfeld. 19 Did you talk to Mr. Harrison at 20 Universal about the functionality of Beats? 21 A No, I did not. 22 CHIEF JUDGE BARNETT: How much more, 23 Mr. Joseph? 24 MR. JOSEPH: Perhaps five or ten minutes 25 and I'll be done.</p>
<p style="text-align: right;">2095</p> <p>1 A I'm sorry, I'm still thinking about what 2 I saw on the website. Maybe I should go ahead. 3 But I'm thinking I would have been able to get 4 free use of the service but for a short period of 5 time. I don't think it would have been free for a 6 longer period of time. I'm sorry, would you 7 repeat your current question? 8 Q Actually, let's see if we can get that 9 clarified. So you understand that Beats offers a 10 free trial of its subscription service, which 11 includes The Sentence, but only for a limited 12 period of time, correct? 13 A I think my recollection is that I think 14 that's correct, yes. 15 Q And you're no longer able to continue to 16 use The Sentence to play full-length tracks of 17 songs after the end of that trial; isn't that 18 correct? 19 A I believe that's correct. 20 Q Thank you for clarifying that. 21 Is it your understanding that Beats is 22 allowed to make performances in ways that would 23 not be compliant with the statutory license? 24 A I don't have anything specific in mind. 25 It's quite possible. Is there a specific -- more</p>	<p style="text-align: right;">2097</p> <p>1 BY MR. JOSEPH: 2 Q Now, Dr. Rubinfeld, let me ask you to 3 turn to page 8 of your written direct testimony, 4 behind tab 1 of your direct examination binder. 5 A I'm there. 6 Q In paragraph 33, do you -- is it true 7 that you made a rate proposal for noncommercial 8 webcasters? 9 A Yes. 10 Q The rate structure you proposed for 11 noncommercial webcasters is different from the 12 construction you proposed for commercial 13 webcasters, correct? 14 A Yes. 15 Q You don't propose to apply a 16 percentage-of-revenue-based fee to noncommercial 17 webcasters, do you? 18 A I do not. 19 Q You state in your testimony that you're 20 not aware of any market license agreements that 21 would apply in the next rate period and could 22 serve as potential benchmarks, correct? 23 A That's correct. 24 Q Are you aware that at the time you 25 submitted your direct testimony, SoundExchange had</p>

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2098	2100
<p>1 reached an agreement with College Broadcasters. 2 Inc., or CBI, to cover rates and terms for 3 noncommercial webcasters for 2016 through 2020? 4 A I don't remember being aware of that. I 5 may have been, but I don't remember it. 6 Q Would you have considered that a 7 relevant market agreement? 8 A Well, I would have to hear more about 9 it, but it sounds like it would be relevant. I 10 don't recall being aware of it at the time I wrote 11 this. 12 Q Are you aware of it now? 13 A You've just described the agreement, but 14 that's the extent of my awareness. 15 Q So your proposal in paragraph 33 is to 16 carry forward a minimum fee of \$500 for a maximum 17 usage of up to 159,940 ATH per month, right? 18 A Yes. 19 Q And for webcasters that exceed that 20 threshold, you're proposing that the judges apply 21 the same rates that you propose for commercial 22 webcasters, correct? 23 A Yes. 24 Q You describe that as a continuation of 25 the current CRB structure?</p>	<p>1 are below the commercial rate. I think that's 2 right. 3 MR. JOSEPH: Your Honor, with that, I 4 promised five to ten minutes, and I have no 5 further questions. 6 CHIEF JUDGE BARNETT: We'll be at 7 recess, then, until 1:05. 8 (A lunch recess was taken.) 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
2099	2101
<p>1 A Yes, that was my understanding. 2 Q But, in fact, there are no noncommercial 3 services that are currently paying the CRB set 4 commercial rate for performances that exceed the 5 monthly ATH threshold, are there? 6 A I don't know that for certain, but I 7 would expect that would be the case. 8 Q Did you look into that before you said 9 you were trying to continue the status quo? 10 A I would -- yes, I would have looked into 11 that. I just don't have a really clear 12 recollection, but I think if I had found a rate 13 that was higher, I would have remembered it, so 14 it's very likely that I did not -- that I did look 15 into it and I did not find any that were higher. 16 Q In fact, you found a rate that was 17 lower, didn't you? 18 A I don't recall. Your memory is better 19 than mine on this. That's quite possible. 20 Q This is your proposal, sir. 21 Are you aware that there are about 25 to 22 30 noncommercial licensees that do pay usage fees 23 but they pay them at a rate that is substantially 24 below the commercial rate? 25 A Yes, I think there are agreements that</p>	<p>1 AFTERNOON SESSION commencing at 1:16 p.m. 2 CHIEF JUDGE BARNETT: Good afternoon. 3 Please be seated. 4 Mr. Hansen, you're going to begin with 5 unrestricted examination? 6 MR. HANSEN: I am, Your Honor. Thank 7 you. I think Mr. Joseph had one housekeeping 8 matter before I start. 9 MR. JOSEPH: Your Honor, Ms. Whittle 10 reminds me that I haven't identified the Exhibit 11 number for the demonstrative we put in -- we 12 offered into evidence and was admitted. It's NAB 13 4233. 14 CHIEF JUDGE BARNETT: Thank you. 4233 15 is admitted. 16 MR. HANSEN: May I proceed, Your Honor? 17 CHIEF JUDGE BARNETT: You may. 18 CROSS-EXAMINATION BY COUNSEL FOR 19 IHEARTMEDIA 20 BY MR. HANSEN: 21 Q Professor Rubinfeld, good afternoon. 22 A Good afternoon. 23 Q I'm Mark Hansen, and I represent 24 iHeartMedia in this case. 25 Dr. Rubinfeld, there was a question this morning whether you cited the Sony cloud amendment</p>

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2102	<p>1 in your reports. Did you have a chance to find</p> <p>2 that over the break?</p> <p>3 A No, I didn't look at it over the break.</p> <p>4 Q I can represent to you we weren't able</p> <p>5 to find it. Do you believe it's in there</p> <p>6 somewhere?</p> <p>7 A I don't have an opinion either way.</p> <p>8 Q Our goal here, Professor Rubinfeld, is</p> <p>9 to determine what willing buyers and willing</p> <p>10 sellers would agree to in this market, the market</p> <p>11 for statutory services, correct?</p> <p>12 A In the market for statutory --</p> <p>13 Q Statutory services.</p> <p>14 A No, I would say willing -- what a</p> <p>15 willing buyer and a willing seller would agree to</p> <p>16 if there were no statutory license.</p> <p>17 Q And they're supposed to be the rates and</p> <p>18 terms that most clearly represent the rates and</p> <p>19 terms that would have been negotiated in the</p> <p>20 marketplace between a willing buyer and a willing</p> <p>21 seller, correct?</p> <p>22 A Yes.</p> <p>23 Q And the marketplace we're concerned with</p> <p>24 is the marketplace for rights that would come</p> <p>25 within a statutory license, correct?</p>	2104
2103	<p>1 A Yes.</p> <p>2 Q And you've already told us, I think,</p> <p>3 several times that you don't consider yourself an</p> <p>4 expert on where the lines get drawn on DMCA</p> <p>5 compliance, correct?</p> <p>6 A Yes, I have a general understanding, but</p> <p>7 I'm definitely not an expert in those lines,</p> <p>8 that's correct.</p> <p>9 Q I'm not going to go back into that</p> <p>10 questioning, but that is what draws the lines,</p> <p>11 right? There's a line and some services are</p> <p>12 within DMCA-compliance that are statutory, and</p> <p>13 others are beyond it and have to get a different</p> <p>14 license, correct?</p> <p>15 A That's correct.</p> <p>16 Q And just so we have a rough working</p> <p>17 understanding here this afternoon, my client,</p> <p>18 iHeart, and Pandora both fall within the group of</p> <p>19 statutory services, correct?</p> <p>20 A Well, the iHeartRadio service does, yes.</p> <p>21 Q And Pandora does as well, right?</p> <p>22 A Yes, that's correct, for the basic</p> <p>23 Pandora service, yes.</p> <p>24 Q Just so we're clear on terms, the</p> <p>25 willing buyers we're concerned with here are the</p>	2105

1 services like iHeart, correct?

2 A Yes.

3 Q And the willing sellers are record

4 labels and other rights holders, correct?

5 A Yes. I'm not quite sure what you mean

6 by "other rights holders" but --

7 Q I'll restrict my question. Record

8 labels are willing sellers for purposes of our

9 analysis, correct?

10 A Yes.

11 Q You would agree, would you not, that in

12 this analysis we're undertaking in this

13 proceeding, the best evidence of what willing

14 buyers and willing sellers would agree to in the

15 marketplace that we're concerned with would be

16 agreements made by willing buyers and sellers for

17 the very rights at issue in statutory services,

18 correct?

19 A No, I don't agree with that.

20 Q You write in your written direct

21 testimony about prior CRB proceedings, correct?

22 A Yes.

23 Q And the services in those proceedings

24 did not offer deals that involved only

25 DMCA-compliant or statutory services, correct?

1 A I don't know what you mean when you say

2 "the services did not offer." You mean as

3 evidence?

4 Q Right. As opposed to benchmarks. You

5 are aware that we, iHeart, are offering certain

6 benchmarks that represent what we claim to be

7 deals that were made for DMCA-compliant services,

8 correct?

9 A I understand that you've been focusing

10 on a particular agreement that you have with

11 Warner, which is DMCA compliant.

12 Q So my question to you, sir, is in your

13 study of the prior proceedings that you've written

14 about in your testimony, isn't it true that none

15 of the services in those proceedings had ever

16 offered as benchmarks deals involving statutory --

17 fully statutory services? And when I say

18 "statutory services," I mean something that

19 complies fully with DMCA.

20 A I can't say there were none, but my

21 recollection is that the emphasis in the prior

22 proceedings was on the use of interactive services

23 and then adjusting those interactive services --

24 the interactive services rates for differences in

25 functionality between interactive and

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<p style="text-align: right;">2106</p> <p>1 noninteractive services.</p> <p>2 Q Do you remember any benchmark ever being</p> <p>3 offered before in one of these proceedings that</p> <p>4 was based on a market deal between buyers and</p> <p>5 sellers for a statutory service as I've defined</p> <p>6 it?</p> <p>7 A I don't remember myself because my</p> <p>8 understanding was that prior experts were</p> <p>9 concerned about the shadow that was cast by deals</p> <p>10 made when there was a statutory license.</p> <p>11 Q I'm just asking if you remember any</p> <p>12 examples. Do you remember any example in your</p> <p>13 study of what you've written about, these prior</p> <p>14 proceedings, where a service offered a benchmark</p> <p>15 from a fully statutory service.</p> <p>16 A I've already told you what I remembered</p> <p>17 and what I didn't remember.</p> <p>18 Q And you don't remember one, do you?</p> <p>19 A I just told you several times that I</p> <p>20 don't remember. What I remember are focuses on</p> <p>21 interactive services, not noninteractive services.</p> <p>22 Q Since the last rate proceeding, there</p> <p>23 have been literally dozens of direct deals in the</p> <p>24 statutory services market, haven't there?</p> <p>25 A There have been many deals if you</p>	<p style="text-align: right;">2108</p> <p>1 statutory services marketplace?</p> <p>2 A I'm sure -- I don't recall exactly what</p> <p>3 searches I did, but I would have looked broadly</p> <p>4 for both interactive and noninteractive services.</p> <p>5 Q Did you ask counsel to supply you with</p> <p>6 any agreements they were aware of, interactive and</p> <p>7 noninteractive?</p> <p>8 A All of -- the answer to that question</p> <p>9 would be the same as the one I gave previously.</p> <p>10 Any requests I had were given through counsel.</p> <p>11 Q So let's start with the agreement you</p> <p>12 mentioned, the iHeart/Warner agreement. You were</p> <p>13 aware of that agreement when you submitted your</p> <p>14 written direct testimony, correct?</p> <p>15 A I was, yes.</p> <p>16 Q You actually had a copy of it, correct?</p> <p>17 A Yes.</p> <p>18 Q And you were aware, were you not, that</p> <p>19 Warner is a SoundExchange member?</p> <p>20 A Yes.</p> <p>21 Q And Mr. Wilcox of Warner sits on the</p> <p>22 licensing committee that manages this litigation,</p> <p>23 correct?</p> <p>24 A I believe that's correct.</p> <p>25 Q And you had access to both witnesses and</p>
<p style="text-align: right;">2107</p> <p>1 include all the deals with indies. I think that's</p> <p>2 correct.</p> <p>3 Q As part of your work in this case,</p> <p>4 Professor, did you ask SoundExchange to provide</p> <p>5 you with all of the deals that SoundExchange knew</p> <p>6 about for the statutory services market?</p> <p>7 A I was interested in looking at deals</p> <p>8 that were both interactive and noninteractive. I</p> <p>9 can't say I asked the question exactly that way,</p> <p>10 but I was interested in both -- when I started</p> <p>11 doing my work, I was interested in both</p> <p>12 interactive and noninteractive services.</p> <p>13 Q With all respect, sir, that's not a</p> <p>14 response to my question. I'm not asking what you</p> <p>15 were interested in. I'm asking did you request of</p> <p>16 SoundExchange to be provided with any and all</p> <p>17 contracts that SoundExchange knew of between</p> <p>18 willing buyers and willing sellers in the</p> <p>19 statutory services marketplace?</p> <p>20 A My recollection was I asked for all</p> <p>21 contracts that would be responsive to my analysis</p> <p>22 that would have entered both markets.</p> <p>23 Q Did you do a Google or other Internet</p> <p>24 search to see what public information there was</p> <p>25 about deals involving buyers and sellers in the</p>	<p style="text-align: right;">2109</p> <p>1 documents from Warner before you filed your</p> <p>2 written direct testimony, correct?</p> <p>3 A Well, I had -- I had access to some</p> <p>4 documents, certainly, but not all documents.</p> <p>5 Q Were you able to ask for documents you</p> <p>6 thought would be relevant to your analysis?</p> <p>7 A I was able to ask any questions I</p> <p>8 wanted, yes, but that --</p> <p>9 Q To the extent --</p> <p>10 A Please let me finish.</p> <p>11 Q Go ahead.</p> <p>12 A That doesn't mean I had all documents.</p> <p>13 I didn't have documents that told me about --</p> <p>14 Q I'm just asking you, sir, did you have</p> <p>15 the ability to ask for documents if you wanted</p> <p>16 them?</p> <p>17 A Well, you asked me about any and all,</p> <p>18 and I was explaining what I knew about and what I</p> <p>19 didn't.</p> <p>20 Q We'll save a little bit of time. I'm</p> <p>21 just asking if you had the ability to ask for</p> <p>22 documents that you wanted to see.</p> <p>23 A Of course I had the ability to ask for</p> <p>24 documents.</p> <p>25 Q Okay. You agree that the Warner/iHeart</p>

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2110	<p>1 is a deal in the statutory services market</p> <p>2 exclusively, correct?</p> <p>3 A Yes.</p> <p>4 Q It involves a willing buyer, correct?</p> <p>5 A Yes.</p> <p>6 Q It involves a willing seller, correct?</p> <p>7 A Yes.</p> <p>8 Q It involves -- it's recent. It's from</p> <p>9 2013, correct?</p> <p>10 A Yes.</p> <p>11 Q The seller is a major label, Warner.</p> <p>12 correct?</p> <p>13 A Yes.</p> <p>14 Q It has about a 20 percent market share</p> <p>15 in the United States market?</p> <p>16 A Yes.</p> <p>17 Q And the service, the buyer, is a major</p> <p>18 service, correct, iHeart?</p> <p>19 A Yes.</p> <p>20 Q And you rejected Warner/iHeart as a</p> <p>21 benchmark, correct?</p> <p>22 A That's correct.</p> <p>23 Q You said relatively little weight should</p> <p>24 be placed on this deal, correct?</p> <p>25 A I did say that.</p>	2112
2111	<p>1 Q And you say, for example, that iHeart's</p> <p>2 deal with Warner isn't a good benchmark because</p> <p>3 it's "strongly anchored by the pureplay rates."</p> <p>4 Do you recall giving that testimony?</p> <p>5 A That would be part of the reason I gave,</p> <p>6 yes.</p> <p>7 Q It's true, isn't it, Professor</p> <p>8 Rubinfeld, that iHeart is not even eligible for</p> <p>9 pureplay rates?</p> <p>10 A What I remember -- that is true, but</p> <p>11 what I remember -- I'm not sure what you're</p> <p>12 citing. What I remember saying was that it was</p> <p>13 heavily influenced by the statutory rates</p> <p>14 generally. I don't remember specifically picking</p> <p>15 out the pureplay rates.</p> <p>16 Q You don't think you commented on the</p> <p>17 pureplay rates in the context of Warner and</p> <p>18 iHeart?</p> <p>19 A I may well have, and I'm sure you'll</p> <p>20 give me the cite.</p> <p>21 Q Why don't we. I'll give you</p> <p>22 paragraph 84 of your written direct testimony if</p> <p>23 you would like to take a look.</p> <p>24 A I would also just suggest you look at</p> <p>25 paragraph 164.</p>	2113

1 Q Honestly, Professor Rubinfeld, I just

2 want to direct you to where I would like to direct

3 you, and you'll have a chance to answer additional

4 questions from your counsel when I'm done.

5 Can you look at paragraph 84 of your

6 written direct testimony.

7 A Yes, that's where I talk about the

8 pureplay rates, and paragraph 164 is where I talk

9 about the shadow of the statutory license.

10 Q We agree that there's no relevance of

11 the pureplay rates to Warner/iHeart because iHeart

12 isn't even eligible for the pureplay rates, is it?

13 A I agree to the second part of your

14 statement, not to the first part.

15 Q So ... you want to talk about the CRB

16 shadow. We'll get to that in a minute. That's

17 another reason you gave for not using

18 Warner/iHeart, correct?

19 A Yes.

20 Q There are at least 28 other deals in the

21 marketplace between willing buyers and willing

22 sellers for purely statutory services that you

23 didn't say a word about in your written direct

24 testimony, correct?

25 A I assume you're referring to deals with

1 independents, which I didn't have access to in

2 many cases.

3 Q Let's ask you some questions about that.

4 Merlin is a consortium of many record labels,

5 correct?

6 A Yes.

7 Q Didn't you refer to Merlin yesterday as

8 the "fifth major"?

9 MR. POMERANTZ: Your Honor, I'm going to

10 object that this is beyond the scope. Professor

11 Rubinfeld is correct that he didn't have the

12 independent deals or the Merlin deal. He does

13 address them in his rebuttal testimony, and the

14 way that this hearing has been organized, is that

15 should come up in the second half of the

16 testimony.

17 CHIEF JUDGE BARNETT: Mr. Hansen.

18 MR. HANSEN: Your Honor, I believe I'm

19 entitled to ask him about what he chose not to put

20 into his report and what he did put in. I am

21 going to establish he did have access to that

22 information had he wished to consider it, and I

23 think that's a relevant consideration for whether

24 his opinion is reliable.

25 CHIEF JUDGE BARNETT: Overruled. He can

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<p style="text-align: right;">2114</p> <p>1 answer that angle at this point. Nothing about 2 the content, but certainly the decisions he made 3 in making his report. 4 BY MR. HANSEN: 5 Q So Professor Rubinfeld, didn't you refer 6 to Merlin yesterday as the "fifth major"? 7 A That is in my report. I don't think we 8 discussed it publicly yesterday, but it is in my 9 report. 10 Q And do you agree with it? That's a fair 11 characterization of Merlin, fifth major? 12 A I wouldn't -- I think that was someone 13 else's characterization. That would not be the 14 way I would characterize it. 15 Q But you say it's in your report that 16 way? 17 A I think -- well, why don't we find the 18 exact cite. I believe I was using that phrase, 19 but I wasn't describing my opinion. I think I was 20 describing something to the effect that people 21 sometimes describe it as the fifth major. That 22 wouldn't my first choice for my words. 23 Q And you say you didn't have access to 24 the Merlin deal with Pandora when you filed your 25 written direct testimony; is that correct?</p>	<p style="text-align: right;">2116</p> <p>1 depend on what the materials said and how they fit 2 into the testimony. 3 Q Now, the Merlin board includes a man by 4 the name of Mr. Van Arman, correct, of Secretly 5 Canadian records? 6 A Yes. 7 Q He's also on the SoundExchange board and 8 on the licensing committee, correct? 9 A I believe he is, yes. 10 Q After the public announcement of the 11 Merlin deal, did you ask SoundExchange to provide 12 you with a copy of the Merlin agreement? 13 A No, I did not. 14 Q How about another one of the Merlin 15 labels who took advantage of this deal, Razor & 16 Tie? Have you ever heard of Razor & Tie? 17 A Yes. 18 Q They're run by a man named Victor 19 Zaraya? 20 A Is that a question? 21 Q Yes. 22 A No, I don't know that. 23 Q Do you know that there's a SoundExchange 24 board member who's the chief executive of Razor & 25 Tie?</p>
<p style="text-align: right;">2115</p> <p>1 A That's correct. 2 Q It was a matter of public record that 3 Merlin had made an agreement with Pandora for 4 statutory services before Warner and iHeart was 5 announced, correct? 6 A I don't have a clear recollection of the 7 relative timing of those deals. 8 Q Well, you know now that Merlin and 9 Pandora precedes Warner/iHeart, don't you? 10 A I just don't have a clear -- you'll have 11 to show me the dates. I don't have a clear sense 12 of which came before the other. 13 Q And there were public announcements 14 about that deal, weren't there? 15 A When it happened, there certainly were, 16 yes. I just don't have the date in my mind. 17 Q You cite many public sources and 18 newspaper articles and similar materials in your 19 written direct testimony, don't you? 20 A Yes, I do. 21 Q So you believe those things are things 22 an expert can and should rely on in framing an 23 opinion, correct? 24 A Well, can rely on if it's appropriate. 25 Should would be a different statement. It would</p>	<p style="text-align: right;">2117</p> <p>1 A I don't know that. 2 Q So you could have gotten access to the 3 Merlin agreements in time for your written direct 4 report had you chosen to ask. 5 MR. POMERANTZ: Objection, Your Honor. 6 I don't think that's a fair question without 7 putting the agreement in front of him, which is, 8 of course, not this stage of the case. But I 9 think there's important information not being 10 revealed here. 11 CHIEF JUDGE BARNETT: Overruled. 12 A I don't know whether I could have had 13 access to that agreement. I don't know the extent 14 to which it was protected or whatever. 15 Q But you -- 16 A I just know I didn't have access to that 17 agreement at the time of my first report. I don't 18 know the exact conditions which may have limited 19 my having access. I assume there were conditions, 20 or I think counsel would have given me access. 21 Q But you didn't know one way or the 22 other, did you? 23 A At the time I wrote my report, I can 24 tell you I did not have the agreement. I don't 25 remember the exact circumstances which led to my</p>

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2118	<p>1 not getting access to that agreement. I became 2 aware of that agreement soon after I completed my 3 report. 4 JUDGE STRICKLER: That was a question I 5 had. Were you aware of the agreement, that Merlin 6 agreement, before you wrote your report. 7 THE WITNESS: I don't have any 8 awareness -- as I think back, I don't -- I don't 9 believe I was aware of it at all. Perhaps it had 10 been public, but I don't believe I was aware of 11 it. 12 BY MR. HANSEN: 13 Q And that involved the largest statutory 14 service, Pandora, correct? 15 A Pandora, I believe, is the largest 16 statutory service, yes. 17 Q You were certainly looking into the 18 public information about Pandora as a part of your 19 work as an expert, weren't you? 20 A Yes. 21 Q So if there was public information about 22 Pandora and Merlin, you were likely to have seen 23 it, weren't you? 24 A Yes. I just don't have a clear 25 recollection of that as I look back.</p>	2120	<p>1 labels. So if you ask me to run through them, I 2 wouldn't be able to do that. 3 Q So, sitting here today, you don't know 4 who records with Beggars, right? 5 A I certainly don't know all of the 6 artists. 7 Q Do you know any? 8 A My recollection -- I'm not positive. 9 That's just something I just don't put to memory. 10 If you told me some names, I probably would be 11 able to tell you which was where, but that's not 12 something I try to memorize. 13 Q Before you filed your written direct 14 testimony, there were public announcements about a 15 contract between iHeart and a record label called 16 Big Machine Group, correct? 17 A That's likely true. 18 Q Did you ask for information after that 19 was publicly announced? 20 A I don't recall specifically asking about 21 Big Machine, but I would have asked about deals 22 that I could get information about. 23 Q Did you ask for information about the 24 iHeart/BMG deal before you filed your written 25 direct testimony?</p>
2119	<p>1 Q Merlin includes record labels such as 2 Beggars, doesn't it? 3 A Yes. 4 Q And Beggars is just as capable of 5 understanding the complexity of the rights and 6 licenses at issue as major labels, and they're 7 careful to license specific rights to specific 8 rates, right? 9 A I just didn't understand the rest of 10 your question. "Careful to license" -- what did 11 you say? 12 Q Sure. 13 Beggars Group is just as capable of 14 understanding the complexity of the rights and 15 licenses at issue and they are just as careful to 16 license specific rights at specific rates as other 17 record labels, correct? 18 A I don't have -- I would not be surprised 19 if that's correct, but I don't know Beggars well 20 enough to know exactly the extent of their 21 expertise, but I assume they're quite expert. 22 Q So you don't know who the label artists 23 are who record with Beggars, right? 24 A I don't -- as a matter of course, I just 25 don't memorize the artists with each of the</p>	2121	<p>1 A I just told you I don't recall 2 specifically making that request. I would have 3 made a general request to get me information about 4 deals that I can analyze. 5 Q Were you aware of the iHeart/Big Machine 6 deal when you filed your written direct report? 7 A I don't have a recollection of it either 8 way. 9 Q You know that that deal was for 10 statutory services only, correct? 11 A I don't know that because I told you I 12 just don't recollect the deal. 13 Q That was in 2013, correct? 14 A I just told you I don't recollect the 15 deal so I can't tell you what year it was. 16 Q Big Machine is a major record label, 17 isn't it? 18 A Yes. Well, it's an independent label, 19 but among the independents, I would say it's a 20 significant independent. 21 Q Do you know who some of the Big Machine 22 artists are? 23 A If I recall, Taylor Swift I think is 24 tied to Big Machine. 25 Q Do you think Taylor Swift is an</p>

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2122	<p>1 important artist?</p> <p>2 A Yes.</p> <p>3 Q Do you think statutory services would</p> <p>4 want to be able to play her music?</p> <p>5 A I think most services would like to be</p> <p>6 able to play her music.</p> <p>7 Q Were you aware of the public controversy</p> <p>8 when Ms. Swift pulled her music from Spotify?</p> <p>9 A Yes.</p> <p>10 Q Were you following that controversy?</p> <p>11 A Yes.</p> <p>12 Q She didn't pull her music from iHeart,</p> <p>13 did she?</p> <p>14 A No, she did not.</p> <p>15 Q Can you think of any other Big Machine</p> <p>16 artists?</p> <p>17 A Not off the top of my head, no.</p> <p>18 Q How about Tim McGraw? Do you know who</p> <p>19 he is?</p> <p>20 A Yes.</p> <p>21 Q Do you consider him a major artist?</p> <p>22 A Yes. I would say he is, but I'm not a</p> <p>23 country specialist. But, yes, he's a name I'm</p> <p>24 quite familiar with.</p> <p>25 Q And the buyer in the Big Machine/iHeart</p>	2124	<p>1 83. Don't you say that "The rates negotiated</p> <p>2 between iHeartMedia, a power buyer, and these 27</p> <p>3 labels have very little probative value"?</p> <p>4 MR. POMERANTZ: Now we're moving into</p> <p>5 the rebuttal testimony, which should be the second</p> <p>6 half of the case.</p> <p>7 MR. HANSEN: I'm just responding to the</p> <p>8 witness' request to see where he said something.</p> <p>9 CHIEF JUDGE BARNETT: Well, actually,</p> <p>10 Mr. Hansen, you're reading it to him. So if you</p> <p>11 have chapter and verse, you can give him that and</p> <p>12 he can look at that and he can answer a yes or no</p> <p>13 question.</p> <p>14 MR. HANSEN: Thank you, Your Honor.</p> <p>15 BY MR. HANSEN:</p> <p>16 Q Professor Rubinfeld, would you go to</p> <p>17 your corrected written rebuttal testimony. I</p> <p>18 believe it's at paragraph 83, but let me just</p> <p>19 double-check.</p> <p>20 Let me know when you're there.</p> <p>21 You reject Big Machine and many other</p> <p>22 deals in this market without --</p> <p>23 A See, you misquoted me, counsel.</p> <p>24 because --</p> <p>25 Q Very --</p>
2123	<p>1 transaction was iHeart, correct?</p> <p>2 A Yes.</p> <p>3 Q IHeart is a major service, isn't it?</p> <p>4 A IHeart definitely is, yes.</p> <p>5 Q You didn't mention one word about the</p> <p>6 iHeart/Big Machine agreement in your written</p> <p>7 direct testimony, did you?</p> <p>8 A That does not appear in my testimony,</p> <p>9 that's correct.</p> <p>10 Q You later reject it as a benchmark, but</p> <p>11 you don't say a word about it in your written</p> <p>12 direct, correct?</p> <p>13 A When you say rejected "it," what do you</p> <p>14 mean?</p> <p>15 Q Reject that deal, the iHeart/Big Machine</p> <p>16 deal. Later on, you reject it, but you don't say</p> <p>17 a word about it in your written direct, right?</p> <p>18 A I don't recall rejecting it. Show me</p> <p>19 where in my testimony I rejected it.</p> <p>20 Q You say it has very little probative</p> <p>21 value; isn't that true?</p> <p>22 A That particular deal, I don't remember</p> <p>23 saying that. You would have to show me.</p> <p>24 Q We'll get to that. Actually, why not.</p> <p>25 Let's look at your written rebuttal testimony at</p>	2125	<p>1 A Please let me finish. I never referred</p> <p>2 to Big Machine. I talked about -- I talked about</p> <p>3 independent labels, but I don't recall ever citing</p> <p>4 Big Machine specifically, and that's why I was</p> <p>5 hesitating.</p> <p>6 Q Let's explore that for a minute. You</p> <p>7 talk about 27 independent record labels, correct?</p> <p>8 A I do.</p> <p>9 Q One of them is Big Machine, right?</p> <p>10 A Yes.</p> <p>11 Q And you say all of them have very little</p> <p>12 probative value, correct?</p> <p>13 A I said, "The rates negotiated between</p> <p>14 iHeartMedia, a power buyer, and these 27 labels</p> <p>15 have very little probative value."</p> <p>16 Q Right. That included Big Machine,</p> <p>17 correct?</p> <p>18 A Yes.</p> <p>19 Q So there were not only Big Machine but</p> <p>20 26 other iHeart agreements with independent record</p> <p>21 labels that you didn't say a word about in your</p> <p>22 written rebuttal testimony, correct?</p> <p>23 MR. POMERANTZ: I think what he meant</p> <p>24 was written direct testimony?</p> <p>25 MR. HANSEN: Written direct, yes, sir.</p>

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<p style="text-align: right;">2126</p> <p>1 CHIEF JUDGE BARNETT: Thank you. 2 Mr. Pomerantz. 3 A I don't recall -- I recall talking about 4 that in my rebuttal, but I don't recall talking 5 about those 27 -- 6 Q Right, that's my question. 7 A -- deals in my direct testimony. 8 Q That's my question. We talked about Big 9 Machine. There were 26 other deals, before you 10 filed your written report -- your written direct 11 report, that were between iHeart and an 12 independent record company that you didn't say a 13 word about in your written direct report, correct? 14 A Well, the deals were the deals. I did 15 not have access to those deals when I wrote my 16 direct report. So I don't -- I can't say I didn't 17 say a word about it, but I would not have talked 18 about them to any length because I didn't have 19 access to those deals at the time. 20 Q Many of the -- many, if not all, of 21 those deals, those additional 26 deals, had been 22 announced publicly, correct? 23 A I don't know how many were announced 24 publicly at that time. 25 Q In the time preceding the filing of your</p>	<p style="text-align: right;">2128</p> <p>1 interested in deals with independents, and I 2 remember requesting information about it, but I 3 was told that counsel did not have access to many 4 of these deals. 5 Q Do you know anything about the 6 individual circumstances of any of these 26 7 independent labels that contracted with iHeart for 8 statutory services prior to your written direct 9 testimony? 10 A I know there were deals, but I didn't 11 have access to information about them. Beyond 12 that, I don't have any more detailed recollection. 13 Q Do you know about a record company 14 called Concord? 15 A Yes. 16 Q Concord is providing a witness to 17 testify in this proceeding. Do you know that? 18 A Yes. 19 Q Do you know who Concord's artists are? 20 A No, I don't -- like I said, I don't 21 generally keep track of which artists are with 22 which labels. 23 Q Do you know if Concord has James Taylor 24 as one of its artists? 25 A I don't know that, but if you tell me</p>
<p style="text-align: right;">2127</p> <p>1 written direct report, were you monitoring the 2 press regarding iHeart as part of your work? 3 A I wouldn't say monitoring the press, but 4 I was reading -- I was trying to keep up on a 5 regular basis, yes. 6 Q Did you have a staff doing likewise? 7 A Yes. 8 Q So any public announcement of a deal 9 that iHeart made would have been known to you, 10 correct? 11 A It's likely that if there was public 12 coverage, my staff or I would have been aware of 13 it. 14 Q You could have asked for any information 15 you wanted to ask for, for any of those deals, 16 correct? 17 A I could -- counsel would allow me to ask 18 anything I wanted to ask, sure. 19 Q You didn't ask for any information about 20 any of those deals, did you? 21 A No, I was interested in -- as I told you 22 several times before, I was interested in any 23 deals that would help inform my analysis. So I 24 can't remember the exact conversation that I had 25 with counsel, but I would have been very</p>	<p style="text-align: right;">2129</p> <p>1 that's true, I have no reason to disagree. 2 Q You would agree that James Taylor is a 3 significant artist, would you? 4 A I would. 5 Q You would agree that services would want 6 to have access to James Taylor's music, correct? 7 A I would. 8 Q How about Paul McCartney? Do you 9 consider him a significant artist? 10 A I do. 11 Q Do you know whether he records for 12 Concord? 13 A I think he probably does. 14 Q Did you know that prior to submitting 15 your written direct testimony? 16 A At various points I would have known the 17 major artists or the major labels, but it's just 18 something that I've not kept in my head so the 19 answer is yes, I probably knew that at one point 20 in time. 21 Q Before you submitted your written 22 report? 23 A If it's Paul McCartney, I probably knew 24 about it before I was involved with this matter if 25 he was with Concord then. I just don't know. I'm</p>

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2130	<p>1 not sure he was with the same label all the time.</p> <p>2 Q How about Glassnote? Do you know if one</p> <p>3 of the 26 additional independent record labels who</p> <p>4 contracted with iHeart for statutory services is a</p> <p>5 company called Glassnote?</p> <p>6 A I don't know that off the top of my</p> <p>7 head, but I would not be surprised.</p> <p>8 Q Do you know who any of Glassnote's</p> <p>9 artists are?</p> <p>10 A No. Like I said, I don't keep track of</p> <p>11 artists and labels.</p> <p>12 Q Have you ever heard of Mumford & Sons?</p> <p>13 A Yes.</p> <p>14 Q Do you know that Mumford & Sons won the</p> <p>15 Album of the Year at the 2013 Grammy Awards?</p> <p>16 A I think they did.</p> <p>17 Q Did you know that before you submitted</p> <p>18 your written direct testimony?</p> <p>19 A I watch the Grammys often. So I</p> <p>20 probably knew it at one point in time, but it's</p> <p>21 not something I would have kept in my head.</p> <p>22 Q Let's do one more. Have you ever heard</p> <p>23 of a company called Bicycle Music?</p> <p>24 A Not off the top of my head.</p> <p>25 Q Do you know if Bicycle Music is one of</p>	2132
2131	<p>1 the additional 26 independent labels who</p> <p>2 contracted with iHeart for statutory services</p> <p>3 prior to you filing your written direct testimony?</p> <p>4 A I don't know for sure.</p> <p>5 Q Do you know who any of Bicycle's artists</p> <p>6 are?</p> <p>7 A Not off the top of my head.</p> <p>8 Q How about sitting here today, your</p> <p>9 current state of knowledge. Do you know anybody</p> <p>10 who records for Bicycle Music?</p> <p>11 A I just told you, I don't know any of the</p> <p>12 artists off the top of my head.</p> <p>13 Q Have you ever heard of the Dave Matthews</p> <p>14 Band?</p> <p>15 A Yes.</p> <p>16 Q Would you consider them major artists?</p> <p>17 A Yes.</p> <p>18 Q Would you consider it important for</p> <p>19 services to have access to their music?</p> <p>20 A I think services would consider that</p> <p>21 important, yes.</p> <p>22 Q How about Nine Inch Nails? Have you</p> <p>23 heard of the band Nine Inch Nails?</p> <p>24 A Yes.</p> <p>25 Q Are they important artists?</p>	2133

1 A Not to me personally, but -- but I think

2 they are considered important otherwise.

3 Q They have their fans, right?

4 A Yes.

5 Q You prefer Bach, but younger people

6 might like Nine Inch Nails, correct?

7 A Actually, I'm really excited about Goat

8 Rodeo these days so it's not just Bach.

9 Q Got me there.

10 Lastly, Willie Nelson. Do you know who

11 Willie Nelson is?

12 A Yes.

13 Q He's a major artist?

14 A Yes.

15 Q Do you know if he records for Bicycle

16 Music?

17 A I don't know that.

18 Q So we've already established that you've

19 rejected all 27 of the independent deals as

20 benchmarks, but you have never, to this date,

21 studied the individual circumstances of any of

22 these deals, have you?

23 A Well, the --

24 MR. POMERANTZ: Objection. It's beyond

25 the scope.

1 A -- characterization --

2 MR. POMERANTZ: Objection. Beyond the

3 scope.

4 CHIEF JUDGE BARNETT: Sustained.

5 BY MR. HANSEN:

6 Q Professor Rubinfeld, did you reject

7 using independent label deals with iHeart before

8 your written direct testimony because, in your

9 view, the independents were too small to matter?

10 A No.

11 Q In the market of sellers we're talking

12 about here for statutory services, there are three

13 firms that have approximately 80 percent of the

14 market; is that correct?

15 A Yes.

16 Q That's Sony, Universal, and Warner?

17 A Yes.

18 Q That leaves about 20 percent of the

19 market for other firms?

20 A Yes.

21 Q Is it your opinion that only the big

22 three constitute willing sellers for purposes of

23 trying to analyze what a market would look like in

24 this proceeding?

25 A No, that's not my opinion.

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2134	<p>1 Q The independent labels are every bit as 2 much sellers as Warner, Sony, and Universal, 3 correct? 4 A Well, they're all sellers. They have 5 different -- obviously, as you just suggested, 6 they have different shares of spends so they're 7 going to have potentially different impacts, but 8 they're certainly all sellers. 9 JUDGE STRICKLER: Excuse me, counsel, 10 for one second. 11 Do you know, Professor, with regard to 12 the independents, what percent of the plays on 13 noninteractive services are represented by 14 independents as opposed to the three majors? 15 THE WITNESS: I don't know off the top 16 of my head the split between interactive and 17 noninteractive. 18 JUDGE STRICKLER: I'm sorry, maybe I 19 didn't ask the question properly. I'm focusing 20 just on the noninteractive, and the question is, 21 what percent of noninteractive plays, over any 22 given period of time, represents plays by 23 independents as opposed to the big three that 24 counsel identified? 25 THE WITNESS: It's in the order of</p>	2136	<p>1 that the rate proposal should be based on 2 benchmarks from a different market, the 3 interactive services market, correct? 4 A Yes, but, just generally, I don't think 5 of it as a separate market. I think of there is 6 one market, one broad market, and within that 7 market, there obviously are differences between 8 interactive services and noninteractive services. 9 But I think of the two as being closely related to 10 each other, as I described when I discussed the 11 convergence yesterday. 12 Q Well, in your opinion, paragraph 18 of 13 your written direct -- I'll give you a minute to 14 get there. Paragraph 18, you write, "The directly 15 licensed agreements between record companies and 16 the category A set of services offering on-demand 17 functionality, 'interactive services,' are the 18 most appropriate benchmarks for this proceeding." 19 Have I read that correctly? 20 A Yes. 21 Q And that's your opinion, correct? 22 A Yes. 23 Q You would agree with me, would you not, 24 that the statutory services and these benchmarks 25 that you've chosen have significantly different</p>
2135	<p>1 20 percent as counsel suggested. I don't have a 2 specific number. 3 JUDGE STRICKLER: Is that 80/20 split 4 applies not just across the music industry as a 5 whole but specifically to noninteractives? 6 THE WITNESS: I believe it would be 7 similar. It might be a few percentage points off, 8 but I think it's in the same ballpark. 9 JUDGE STRICKLER: Thank you. 10 BY MR. HANSEN: 11 Q Is that something you studied and did a 12 calculation on? 13 A I've looked at that subject, but I don't 14 remember doing a specific calculation, which is 15 why I couldn't give Judge Strickler a specific 16 answer. 17 Q Can you direct us to where in your 18 written direct testimony you analyze whether 19 percent of market share equates more or less to 20 percent of spins on the noninteractive market? 21 A I just told you I don't recall doing a 22 breakdown of that type, which is why I couldn't 23 given a specific numerical answer. 24 Q Let's move on to a slightly different 25 subject. The opinion you've given in this case is</p>	2137	<p>1 functionality, correct? 2 A They do have -- they do have different 3 functionality. I think it is significant compared 4 to the statutory services. 5 Q So, for example, the benchmarks that you 6 use have directly licensed -- or have unlimited 7 skips, correct? 8 A You're talking about my category A 9 services. Many of them do, yes. 10 Q And that would take them outside the 11 statutory services, correct? 12 A Yes. 13 Q The category A benchmarks you use 14 typically provide cached downloads, correct? 15 A Many of them do, yes. 16 Q And cached downloads would take those 17 services outside the statutory services, correct? 18 A That's correct. 19 Q The category A interactive services 20 you've used typically provide for on-demand choice 21 of songs, correct? 22 A Many of them do, yes. 23 Q That feature would take those services 24 outside the statutory services, correct? 25 A Correct.</p>

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2138	<p>1 Q And in order to use what you've used as</p> <p>2 your category A benchmarks, I think I listened to</p> <p>3 your testimony accurately yesterday, you said, "I</p> <p>4 had to make a bunch of adjustments."</p> <p>5 Do you recall that testimony?</p> <p>6 A I'm sure I testified that I had to make</p> <p>7 a number of adjustments. I don't know whether I</p> <p>8 used the word "bunch" or not, but if you say so,</p> <p>9 that's fine.</p> <p>10 Q The record will be whatever it will be.</p> <p>11 You also testified earlier today and</p> <p>12 yesterday that you had to make a number of</p> <p>13 assumptions, correct?</p> <p>14 A I have talked about assumptions as well,</p> <p>15 but I don't know what the reference is here when</p> <p>16 you're saying that.</p> <p>17 Q Well, you agree that in order to use</p> <p>18 your category A services as a benchmark for the</p> <p>19 market for statutory services, you had to make</p> <p>20 certain assumptions.</p> <p>21 A I think the answer is yes, but your</p> <p>22 reference is unclear. I had a methodology, and</p> <p>23 when you develop a methodology, there are</p> <p>24 assumptions that go into that methodology.</p> <p>25 Q I believe you told us earlier this</p>	2140
2139	<p>1 independent record labels, correct?</p> <p>2 A Either for not considering them or for</p> <p>3 giving them insufficient weight. I'm not sure</p> <p>4 which -- that Dr. Pelcovits had very limited</p> <p>5 information about independent deals when he did</p> <p>6 his work.</p> <p>7 Q Regardless of whether -- what the reason</p> <p>8 for the failing was, that was a criticism</p> <p>9 expressed in prior proceedings, correct?</p> <p>10 A I was just trying to get the language</p> <p>11 right. There was a criticism of his failure to</p> <p>12 fully account for independents, is what I recall.</p> <p>13 Q In your written direct testimony, you</p> <p>14 don't have one word of explanation having to do</p> <p>15 with any of the independent record labels who made</p> <p>16 deals in the statutory services market, correct?</p> <p>17 A I don't know whether I have one word or</p> <p>18 not, but I have much more information about</p> <p>19 independent deals in the interactive services</p> <p>20 market, which is the starting point for my</p> <p>21 analysis.</p> <p>22 Q The Pelcovits model or analysis was also</p> <p>23 criticized in prior proceedings because</p> <p>24 Dr. Pelcovits projected or proposed increasing</p> <p>25 rates over a period of time when the market prices</p>	2141
2139	<p>1 morning that at least for one of those</p> <p>2 assumptions, you were unable to do the empirical</p> <p>3 work that you would have otherwise liked to be</p> <p>4 able to do to confirm the reasonableness of your</p> <p>5 approach, correct?</p> <p>6 A That was the assumption that relates the</p> <p>7 subscription price to the royalty rate. That's</p> <p>8 correct. In an ideal world, I would have tried to</p> <p>9 calculate the various elasticities and other</p> <p>10 parameters you would need to do that calculation,</p> <p>11 but I don't think such data are available, and I</p> <p>12 don't think any expert has actually tried to do</p> <p>13 that calculation.</p> <p>14 Q But for whatever reason, you haven't</p> <p>15 done it, have you?</p> <p>16 A I haven't done a specific calculation.</p> <p>17 That's why I did have to make an assumption.</p> <p>18 Q Now, I'm not going to duplicate the</p> <p>19 questions my colleagues asked you about prior</p> <p>20 criticism of the Pelcovits analysis with the</p> <p>21 exception of two things I don't believe were</p> <p>22 covered.</p> <p>23 In prior proceedings, the CRB has</p> <p>24 criticized what I'll call the Pelcovits approach</p> <p>25 for failure to consider deals involving</p>	2141
2139	<p>1 were, in fact, declining. Do you recall that</p> <p>2 criticism?</p> <p>3 A I think so, yes.</p> <p>4 Q You've proposed increasing rates going</p> <p>5 from 2016 to 2020, correct?</p> <p>6 A Yes.</p> <p>7 Q On your slide 36 yesterday, you told us</p> <p>8 that subscription rates in the interactive</p> <p>9 services market are declining, correct?</p> <p>10 A Yes, and I told you the rates had gone</p> <p>11 up in the statutory service market as well.</p> <p>12 Q You know, Professor Rubinfeld, honestly,</p> <p>13 I think you understand my questions, don't you? I</p> <p>14 wasn't asking you about the statutory service</p> <p>15 market. I was asking you, do you recall the</p> <p>16 testimony you gave yesterday about, at slide 36,</p> <p>17 that subscription prices in the interactive</p> <p>18 services market were declining. That was my</p> <p>19 question. Did you understand my question?</p> <p>20 MR. POMERANTZ: Your Honor, he doesn't</p> <p>21 need to lecture the witness. We can just have a</p> <p>22 question and answer here.</p> <p>23 CHIEF JUDGE BARNETT: Sustained.</p> <p>24 BY MR. HANSEN:</p> <p>25 Q Did you understand my question,</p>	2141

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2142	<p>1 Dr. Rubinfeld?</p> <p>2 A Yes, I did.</p> <p>3 Q On slide 36 yesterday you told us that</p> <p>4 subscription prices in the interactive services</p> <p>5 market are declining, correct?</p> <p>6 A I've already answered that. I did.</p> <p>7 Q You've also told us that the royalty</p> <p>8 rates being paid by interactive services companies</p> <p>9 are declining, too, correct?</p> <p>10 A Yes.</p> <p>11 Q You testified in your written direct,</p> <p>12 paragraph 21. "Nonetheless, I believe it is</p> <p>13 appropriate in this proceeding to place greater</p> <p>14 reliance on interactive benchmarks." And that is</p> <p>15 your opinion, correct?</p> <p>16 A Yes.</p> <p>17 Q So I want to move to a different</p> <p>18 subject, the subject of promotional and</p> <p>19 substitutional effect, which I am not sure has</p> <p>20 fully been covered yet. It's right in the statute</p> <p>21 that governs this proceeding that the judges</p> <p>22 "shall base their decision on economic,</p> <p>23 competitive, and programming information presented</p> <p>24 by the parties, including whether the use of the</p> <p>25 service may substitute for or promote the sales of</p>	2144
2143	<p>1 phonorecords or otherwise may interfere with or</p> <p>2 may enhance the sound recording copyright owners'</p> <p>3 other streams of revenue from its sound</p> <p>4 recordings."</p> <p>5 So my question, Professor Rubinfeld, is,</p> <p>6 if there are significant promotional benefits to</p> <p>7 record labels from spins on the statutory</p> <p>8 services, the panel would have to factor that into</p> <p>9 the analysis and the rate, correct?</p> <p>10 A I think if there are -- following my</p> <p>11 methodology, I would think it would be appropriate</p> <p>12 to consider differences between promotional</p> <p>13 effects and interactive services and</p> <p>14 noninteractive services.</p> <p>15 Q Could you answer my question, sir. Is</p> <p>16 that a fact? Is the factor of promotion, whether</p> <p>17 a service promotes the sale of the products of the</p> <p>18 record labels, isn't that a factor that has to be</p> <p>19 taken into account in setting the rate?</p> <p>20 A I think I answered your question, but I</p> <p>21 was putting it in context because you've been</p> <p>22 asking me questions about my methodology. So I</p> <p>23 was just trying to put it in the proper context.</p> <p>24 Yes, I do think it is appropriate to account for</p> <p>25 issues related to both promotion and substitution.</p>	2145
	<p>1 Q Okay. So just so we're using the same</p> <p>2 language here, if the evidence in this proceeding</p> <p>3 proved that the statutory services promoted or</p> <p>4 increased the revenues of the record labels, that</p> <p>5 would, other things being equal, tend to suggest a</p> <p>6 lower rate, correct?</p> <p>7 A I think you would want to distinguish</p> <p>8 between promotions which reduced downloads</p> <p>9 which -- for which I think I would agree, and</p> <p>10 promotions which affected the number of spins,</p> <p>11 which might otherwise be accounted for.</p> <p>12 Q Maybe my question wasn't clear. If the</p> <p>13 evidence proved that the record label revenues,</p> <p>14 from whatever it was selling, were enhanced or</p> <p>15 increased as a result of what the statutory</p> <p>16 services did in playing whatever music they</p> <p>17 played, that would be a factor, all else equal,</p> <p>18 that would tend toward a lower rate, wouldn't it?</p> <p>19 A With respect to downloads, I think</p> <p>20 that's correct. With respect to promotions that</p> <p>21 would affect spins, I think -- I think, depending</p> <p>22 on how you worked out the effect, it would already</p> <p>23 be accounted for in the other empirical analysis</p> <p>24 and you wouldn't necessarily need a separate</p> <p>25 adjustment. But the important thing in my</p>	
	<p>1 methodology is to compare promotional effects with</p> <p>2 interactive services to those effects in</p> <p>3 noninteractive services.</p> <p>4 Q I'm just asking you about a factor that</p> <p>5 we're considering here. I'm not asking you at</p> <p>6 this point about your methodology.</p> <p>7 I'm going to ask you the question about</p> <p>8 substitution now. Substitution is a factor that</p> <p>9 has to be considered in this proceeding, correct?</p> <p>10 A I think it is appropriate to consider</p> <p>11 substitution, yes.</p> <p>12 Q That's the other side of the promotion</p> <p>13 coin, correct?</p> <p>14 A I'm not sure I would want to</p> <p>15 characterize it that way.</p> <p>16 Q I'll withdraw the question.</p> <p>17 If the evidence in this proceeding</p> <p>18 proved that the activities of the statutory</p> <p>19 services caused declines in the sales of the</p> <p>20 record labels, that would, other things being</p> <p>21 equal, tend toward a higher rate, wouldn't it?</p> <p>22 A That's not -- that's not entirely clear</p> <p>23 to me because it would depend -- it would depend</p> <p>24 on who is -- who's doing the deal. For example,</p> <p>25 if Apple is doing a deal, Apple has an -- and</p>	

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<p style="text-align: right;">2146</p> <p>1 we're talking about downloads or sales through the 2 iTunes Store, then Apple has an interest as the 3 seller of the downloads. So the answer might be 4 different if you're talking about sales through 5 the iTunes Store or if you're talking about sales 6 elsewhere. 7 JUDGE STRICKLER: Would that be because 8 the sales through the iTunes Store would be 9 another alternative revenue source for the record 10 companies? 11 THE WITNESS: Yes. 12 BY MR. HANSEN: 13 Q So all in, you would have to look at all 14 the promotional and substitutive effects to see 15 which way they pointed, correct? 16 A I think looking at -- I agree that 17 looking -- you would want to look at the promotion 18 and substitutional issues to fully analyze the 19 rate setting in this case. I agree with that. 20 Q We'll try it one more time. Maybe if my 21 question is unclear, I'll just move on. 22 Let's take my client, iHeart. If iHeart 23 proves that, on balance, we caused the record 24 companies to have greater revenues than they 25 otherwise have, we should get a lower rate,</p>	<p style="text-align: right;">2148</p> <p>1 Q Of your written direct. 2 I'll direct you to -- close to the 3 bottom, about six lines up, where you write, 4 "Simply put, the notion of promoting sales of 5 music is quickly becoming an anachronism." 6 Is that your testimony? 7 A That's what I said, but if you read the 8 entire paragraph, you see that it's in the context 9 of talking about lost revenues from the sale of 10 CDs and downloads. 11 Q You -- 12 A I still think -- let me finish my 13 sentence. I still -- 14 Q No, you finished my sentence. I asked 15 you if that's what you wrote. That's all I asked. 16 A No, I think you asked me -- 17 Q I've got another question for you, 18 Professor Rubinfeld. 19 Did you do any study that you can point 20 me to in your written direct testimony to measure 21 whether or not record labels receive promotional 22 benefits from, let's start with interactive 23 services? 24 A I don't recall such a cite off the top 25 of my head, no.</p>
<p style="text-align: right;">2147</p> <p>1 shouldn't we? 2 A No, I don't think that necessarily 3 follows. 4 Q Okay. Let's talk about promotion. 5 You've given an opinion about promotion in your 6 written direct testimony, correct? 7 A I'm sure I've talked about it, yes. 8 Q In fact, you call it an anachronism; 9 isn't that right? 10 A From my recollection -- you can cite me 11 to the paragraphs -- I was talking about the link 12 between promotion and downloads or CD sales, one 13 or the other or both. Can you refer me to where 14 I -- I know I used that term, but I don't remember 15 exactly the context. 16 Q Do you recall calling promotion an 17 anachronism? 18 A I just told you I don't remember the 19 exact sentence. I think, to be fair, you should 20 show it to me. 21 Q I'm happy to show it to you. Look at 22 paragraph 161. 23 A 161? 24 Q Yes. 25 A All right, thank you.</p>	<p style="text-align: right;">2149</p> <p>1 Q Same question for statutory services. 2 Can you point me to any study in your written 3 direct testimony on whether or not record labels 4 receive promotional benefits from statutory 5 services? 6 A I don't recall specific studies -- 7 studies that I cited in my report. 8 Q In fact, you say that streaming is 9 replacing sales, that is, substituting, correct? 10 A Where -- where are you citing that? 11 Q Well, before I cite to you, let me just 12 ask if you remember making such a conclusion in 13 your work. 14 A I remember clearly saying that streaming 15 has been increasing and CD sales and downloads 16 have been decreasing. What I don't believe I said 17 was that one necessarily causally affected the 18 other. I think they left that as an open issue. 19 Q Let's look at paragraph 138 of your 20 written direct testimony, please. I'm directing 21 you to the third line, where you write, "First, it 22 is widely expected that streaming will continue to 23 replace sales of CDs and downloads over time." 24 That was what you wrote, correct? 25 A Yes.</p>

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2150	<p>1 Q Are you telling us that you didn't mean 2 to suggest by that language there was a causal 3 relationship? 4 A No, I didn't mean a narrow causal 5 relationship. I meant to simply say the pattern 6 is going to continue. I think there are many 7 causes, streaming is likely one of them, but not 8 the only one, for the lost sales of CDs and 9 downloads. I didn't mean to say that there was 10 some narrow, causal tie there. I tend to believe 11 there is, but it's not something I specifically 12 studied. 13 JUDGE STRICKLER: A question for you 14 that relates a bit to this. I wanted to ask you, 15 you looked at in your report, in your analysis, 16 the interactive rates, which is your benchmark, 17 right? 18 THE WITNESS: Yes. 19 JUDGE STRICKLER: Do you have an 20 understanding whether the interactive rates that 21 were set in the marketplace incorporate the 22 substitution and promotion effects, if any, of 23 interactive streaming on the sale of downloads or 24 CDs? 25 THE WITNESS: My sense would be yes,</p>	2152	<p>1 different substitution or promotional effects in 2 the noninteractive markets that, according to your 3 approach, are not already captured in the 4 interactive rates? 5 THE WITNESS: I personally have not seen 6 evidence which convinces me that there are 7 differences. It's not -- I haven't been able to 8 do any empirical study on my own, but I haven't 9 seen evidence that convinces me that there's a 10 clear difference between the two. 11 JUDGE STRICKLER: Thank you. 12 Thank you, counsel. 13 MR. HANSEN: Thank you, Your Honor. 14 That actually suggests my next question. 15 BY MR. HANSEN: 16 Q It's certainly possible, is it not, 17 Professor Rubinfeld, that the promotional or 18 substitutive effects of iHeart's simulcast are 19 different from the promotional or substituted 20 effects of Spotify's on-demand service, correct? 21 A Yes, it is possible, sure. 22 Q And you didn't do anything in your 23 interactive benchmark to calculate or to adjust 24 for the possibility of those different promotional 25 or substitutive effects, correct?</p>
2151	<p>1 that the rates that are negotiated are going to be 2 negotiated in the world in which all of those 3 other forces are existing. So I think they would 4 be reflecting those forces. It's very hard to try 5 to sort them out. 6 JUDGE STRICKLER: So if we were trying 7 to, then, as we have to, establish the 8 noninteractive rates, if we were looking 9 separately, if we chose to look separately at 10 promotional or substitution effects of 11 noninteractive streaming, if we used your 12 benchmark, your benchmark has already incorporated 13 some of those substitution and promotional effects 14 such that if we were going to add on or subtract, 15 we would have to see a specifically different 16 effect in the noninteractive market vis-a-vis 17 substitution and promotion, correct? 18 THE WITNESS: I agree with that. If you 19 thought the effects were similar, then you 20 wouldn't need to do an adjustment. But if there 21 were a different effect between interactive and 22 noninteractive, then you would have to consider 23 how to adjust it -- adjust for that. 24 JUDGE STRICKLER: Is it your testimony 25 one way or the other that there are additional or</p>	2153	<p>1 A I have not done any specific adjustment 2 because I haven't seen evidence that compels me to 3 do the adjustment, but you're correct, I've not 4 done such an adjustment. 5 Q You would have to actually do a study 6 before you could know the truth on that one way or 7 the other, wouldn't you? 8 A Well, either do a study or find other 9 studies that you felt compelling. 10 Q You didn't do a study, though, did you? 11 A I did not, not an empirical study. 12 Q That's an open question, then, to your 13 analysis, correct? 14 A From my point of view, it is an open 15 question. 16 Q If it were to turn out that there were 17 significantly different promotive or substitutive 18 effects, in the market this panel has to set rates 19 for, from your interactive different benchmark 20 market, that would make your benchmark 21 inapplicable, correct? 22 A No, I wouldn't say it's inapplicable. 23 But if one saw a clear difference in patterns, 24 that would be another factor one would want to 25 take account of.</p>

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2154	<p>1 Q In fact, promotion is not an 2 anachronism, but it's quite important for record 3 labels; isn't that true? 4 A I never said that promotion was an 5 anachronism. Again, you're mischaracterizing my 6 testimony. You've done that consistently. 7 Q Who put the word "anachronism" in your 8 report? 9 A The fact that I used the word doesn't 10 mean that I simply said promotion is an 11 anachronism. As I said to you before, I was 12 talking about the effect of promotion on CD sales 13 and downloads. 14 Q That's a major part of a record 15 company's revenues, isn't it? 16 A CD sales? It still is, but it's 17 declining pretty rapidly. 18 Q I'm going to read to you from the 19 testimony in evidence of a man named Charlie Walk. 20 Do you know who Charlie Walk is? 21 A He's someone I've seen in these 22 proceedings, but I don't recall exactly his 23 position. 24 Q I'll represent to you that he's 25 executive vice president of Republic Records,</p>	2156	<p>1 of promotion of record labels changed?" Answer, 2 "I think it's the same. It's been still a 3 forefront of a music company." 4 Do you have any basis for disagreeing 5 with that? 6 A No. 7 Q Now, how about spending, did you study 8 as part of your work -- 9 CHIEF JUDGE BARNETT: What's the exhibit 10 number on Mr. Walk? 11 MR. HANSEN: We will get that for you, 12 Your Honor. It was offered last week during the 13 testimony of Mr. Harleston, I believe. May I 14 proceed while we're getting that, Your Honor? 15 CHIEF JUDGE BARNETT: Yes, please, go 16 ahead. 17 BY MR. HANSEN: 18 Q Now, there's also spending done by major 19 record labels on promotion, correct? 20 A Yes. 21 Q Is that something you've studied? 22 A It's something I've considered, sure. 23 Q Do you know whether, in the aggregate, 24 record labels spend more on promotion or less on 25 promotion than they did five years ago?</p>
2155	<p>1 which is a record label within the Universal 2 group. And at paragraph -- at lines 2 to 5 of 3 page 32, Mr. Walk is asked the following question 4 and gives the following answer. 5 MR. POMERANTZ: Objection, Your Honor. 6 I don't think this testimony is in evidence, and 7 by reading it into the record, he's putting it 8 into evidence. And he's just asking -- 9 MR. HANSEN: It's in evidence. It was 10 offered last week. 11 MR. POMERANTZ: Is it in evidence? Then 12 I withdraw my objection. 13 BY MR. HANSEN: 14 Q At page 32, 2 through 5, question, 15 "Would you agree that the notion of promoting 16 sales of music is quickly becoming outdated, that 17 promotion is passe?" Answer, "No, it's 18 important." 19 Would you have any basis for disagreeing 20 with Mr. Walk? 21 A No. I haven't heard Mr. Walk's 22 testimony so I really can't disagree or agree. 23 Q At page 31, lines 11 through 17, 24 Mr. Walk gives the following answer to the 25 following question. Question, "Has the importance</p>	2157	<p>1 A I actually haven't looked at the 2 numbers. I would presume that it's more, but I 3 don't recall looking at the numbers. 4 Q Do you know how many people are employed 5 in the promotion departments of major record 6 labels? 7 A No, I don't know those numbers. 8 Q Do you know whether the head count has 9 increased or decreased over the past five years? 10 A That's not something I've specifically 11 looked at. 12 Q Is it fair to assume that the record 13 labels don't spend their money on activities that 14 don't, at least in their judgment, add to the 15 bottom line? 16 A I presume that the record companies are 17 profit-maximizing companies, yes. 18 Q So if they spend money on promotion, 19 they must think there's a benefit to it, correct? 20 A I would say that's generally correct. 21 Q Now I'm going to ask you some questions 22 about documents from the record labels. You have 23 cited to numerous record label documents in your 24 various written testimonies, correct? 25 A Yes.</p>

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2158	<p>1 Q You put one up on the screen and talked 2 about it yesterday, correct? 3 A Probably, yes. 4 Q Do you remember? 5 A The record label document that I put on 6 the screen? 7 Q Actually, you didn't. Mr. Pomerantz 8 did, and you commented on it. It was a document 9 from Sony, I believe. Do you remember giving that 10 testimony yesterday? 11 A Yes, I do. 12 Q It was a Sony internal document placed 13 on the screen in the form of a slide, and you gave 14 testimony based on it, correct? 15 MR. POMERANTZ: Your Honor, just to be 16 clear, I think it was a Warner document that 17 Mr. Hansen is referring to, so the record is 18 clear, but his point is still valid. It's just a 19 Warner document. 20 MR. HANSEN: I apologize. 21 CHIEF JUDGE BARNETT: Thank you, 22 Mr. Pomerantz. 23 MR. HANSEN: I didn't mean to misspeak. 24 Your Honor, it's iHeartMedia 3242 admitted into 25 evidence.</p>	2160	<p>1 within the record labels? 2 A Yes, I do. 3 Q So have you seen documents in the course 4 of your work that showed you that the record 5 labels found promotional benefit from the 6 statutory services? 7 A I'm sure I've seen documents to that 8 effect. 9 Q Let me -- let me ask you to turn to 10 Exhibit -- tab 5 in the book we've given you, 11 Exhibit 3512. It's -- 12 A Excuse me. 13 Q I'm just going to identify it before I 14 ask you any questions about it. It's a cover 15 e-mail attaching a Sony music document. 16 Your Honor, I'm going to offer this into 17 evidence so I can ask the witness if this is 18 something consistent with his opinions. It's a 19 Sony document, business record admission. 20 MR. POMERANTZ: Your Honor, I don't 21 think Professor Rubinfeld is the right witness to 22 offer a Sony document into evidence. He's not a 23 sponsoring witness of a business document. 24 MR. HANSEN: He indicated it's relevant 25 to his opinion, and this is a witness who has</p>
2159	<p>1 A It's becoming clear, yes, it's a Warner 2 document. 3 Q I apologize for calling it a Sony 4 document. But you now remember the testimony. 5 A Generally, yes. 6 Q So you believe that internal record 7 label documents are relevant to your opinions, 8 correct? 9 A Generally, yes, they can be relevant. 10 Q And you reviewed a number of them in 11 connection with your work, correct? 12 A Yes. 13 Q Did you review record label documents on 14 the question of promotion and substitution? 15 A I would have reviewed a wide range of 16 documents that I had access to, and the documents 17 would -- presumably included promotion and 18 substitution. I don't remember breaking it into a 19 separate category. 20 Q Would you expect the question of what 21 promoted record company revenues and what 22 substituted for or harmed their revenues would be 23 a subject the record labels followed closely? 24 A Yes. 25 Q So it would be the subject of analysis</p>	2161	<p>1 given opinions about promotion. 2 MR. POMERANTZ: Your Honor, that's often 3 the case with experts. It doesn't make what they 4 rely upon admissible evidence. They just simply 5 rely upon it for their opinion. I am not 6 suggesting he can't question the witness about it. 7 CHIEF JUDGE BARNETT: It doesn't need to 8 be admitted, but if somebody is going to be 9 offering it, it's going to be admitted at some 10 point. 11 MR. POMERANTZ: They've been tying our 12 hands on all sorts of evidence coming in. If -- 13 when Mr. Kooker comes back, if they want to offer 14 it, if it's able to get in, they can get it in 15 through Mr. Kooker. 16 CHIEF JUDGE BARNETT: Okay. 17 MR. HANSEN: Your Honor, it would be a 18 disadvantage to the panel to wait until the last 19 day of the hearing to deal with this exhibit. 20 It's a business record. It's an admission. It 21 would be more meaningful if we can do it this way. 22 It's clearly admissible, and this witness has 23 testified it's relevant to his opinions. So using 24 it in evidence now is the most efficient way to 25 conduct this proceeding.</p>

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<p style="text-align: right;">2162</p> <p>1 CHIEF JUDGE BARNETT: I don't think 2 relevant is the standard. I think it's something 3 he relied upon. Was that his testimony, he relied 4 upon it? 5 MR. HANSEN: The testimony is that he 6 relied upon documents regarding promotion. I want 7 to ask him how this document regarding promotion 8 affects his opinion, and this is a promotional 9 document from Sony. It is an admissible document. 10 THE WITNESS: Your Honor, I'm not sure 11 I've seen this document before. 12 CHIEF JUDGE BARNETT: That might solve 13 the problem. Let's lay the foundation if you can, 14 then we'll go from there. 15 BY MR. HANSEN: 16 Q Have you seen this document before? 17 A I don't recall seeing it, no. 18 MR. HANSEN: I want to ask him about 19 documents he didn't consider to see whether it 20 would change his opinions, and I think that's 21 relevant cross-examination of an expert. And the 22 document is an admission by Sony. 23 MR. POMERANTZ: It doesn't come into 24 evidence on that basis. I think if he's asking 25 whether he can question a witness about a</p>	<p style="text-align: right;">2164</p> <p>1 wait out in the anteroom. Thank you. 2 While they're clearing, Mr. Hansen, you 3 said slide number? 4 MR. HANSEN: It's numbered 19 in the 5 bottom right-hand corner. 6 CHIEF JUDGE BARNETT: Thank you. 7 MR. HANSEN: If you're doing it in 8 non-landscape format, it's 21 of 37. So if you're 9 looking regular book way, it's 21 through 37. If 10 you're doing it in landscape format it's the 19th 11 of the dominant slides. 12 CHIEF JUDGE BARNETT: Thank you. 13 MR. HANSEN: Thank you, Your Honor. 14 (THIS ENDS PUBLIC SESSION) 15 (RESTRICTED SESSION BOUND SEPARATELY) 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">2163</p> <p>1 document, I'm not objecting on that basis. 2 CHIEF JUDGE BARNETT: Okay, thank you. 3 Proceed, Mr. Hansen. 4 BY MR. HANSEN: 5 Q Let me ask you to take a look, 6 Dr. Rubinfeld, in this document that you say you 7 were not shown, slide 19. 8 A Just to be clear, I said I wasn't sure 9 I've seen -- 10 MR. HANSEN: Slide 19, landscape format. 11 MR. POMERANTZ: Which exhibit? 12 MR. HANSEN: It's tab 5, Exhibit 3512. 13 BY MR. HANSEN: 14 Q Were you aware, Professor Rubinfeld, 15 that Sony research concluded that streaming is the 16 leading source of discovery followed by 17 traditional AM/FM? 18 CHIEF JUDGE BARNETT: Are we talking 19 about some restricted material here? 20 MR. HANSEN: I believe we are now, Your 21 Honor. 22 MR. POMERANTZ: Thank you, Your Honor. 23 CHIEF JUDGE BARNETT: For those of you 24 who are in the courtroom and have not signed the 25 nondisclosure certificate, if you could please</p>	<p style="text-align: right;">2165</p> <p>1 (THIS BEGINS RESTRICTED SESSION) 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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2247

1 CERTIFICATE OF SHORTHAND REPORTER
2 I, Michele E. Eddy, Registered
3 Professional Reporter and Certified Realtime
4 Reporter, the court reporter before whom the
5 foregoing proceedings was taken, do hereby certify
6 that the foregoing transcript is a true and
7 correct record of the testimony given; that said
8 testimony was taken by me stenographically and
9 thereafter reduced to typewriting under my
10 supervision; and that I am neither counsel for,
11 related to, nor employed by any of the parties to
12 this case and have no interest, financial or
13 otherwise, in its outcome.

14
15 IN WITNESS WHEREOF, I have hereunto set
16 my hand and affixed my notarial seal this 7th day
17 of May, 2015.

18
19 My commission expires June 30, 2017

20
21 _____
22 MICHELE E. EDDY
23 NOTARY PUBLIC IN AND FOR
24 THE DISTRICT OF COLUMBIA

25

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